10-25-2017

Mulberry v. Burns Concrete, Inc. Clerk's Record Dckt. 45184

IN THE SUPREME COURT OF THE STATE OF IDAHO

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiff/Respondents, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLC, Defendant/Appellants.	)	Case No. CV-2016-3413 Docket No. 45184

* * * * * * * * * * * * * *

CLERK'S RECORD ON APPEAL

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Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE DANE H. WATKINS, District Judge.

* * * * * * * * * * * * * *

Lindsey Romankiw
980 Pier View Drive, Suite B
Idaho Falls, ID 83402-2913
Attorney for Respondents

Robert Burns
800 W. Main Street, Suite 1300
Boise, ID 83702
Attorney for Appellants

Nora A Mulberry, TN Properties LLC vs. Burns Concrete, Inc., an Idaho Corporation, Canyon Cove Development Company LLP

Date	Code	User		Judge
6/29/2016	SMIS	CPETERSON	Summons Issued	Dane H Watkins Jr
	NCOC	CPETERSON	New Case Filed-Other Claims	Dane H Watkins Jr
	NOAP	CPETERSON	Plaintiff: Mulberry, Nora A Notice Of Appearance Donald F Carey	Dane H Watkins Jr
	NOAP	CPETERSON	Plaintiff: TN Properties LLC Notice Of Appearance Donald F Carey	Dane H Watkins Jr
		CPETERSON	Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Carey Perkins LLP Receipt number: 0027648 Dated: 6/29/2016 Amount: $221.00 (Check) For: Mulberry, Nora A (plaintiff) and TN Properties LLC (plaintiff)	Dane H Watkins Jr
	COMP	CPETERSON	Verified Complaint for Declaratory Judgment	Dane H Watkins Jr
		CPETERSON	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Carey Perkins LLP Receipt number: 0027761 Dated: 6/29/2016 Amount: $4.00 (Cash)	Dane H Watkins Jr
7/6/2016		CPETERSON	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Moffatt Thomas Barrett Rock & Fields Receipt number: 0028634 Dated: 7/6/2016 Amount: $27.00 (Check)	Dane H Watkins Jr
	ASRV	JNICHOLS	Affidavit of Service - Burns Concrete INC By Serving Kirk Burns 06/29/2016	Dane H Watkins Jr
7/7/2016	ASRV	TCORONA	Affidavit of Service - 07/06/16 Linda Wilkins	Dane H Watkins Jr
	NOAP	TCORONA	Defendant: Burns Concrete, Inc Notice Of Appearance Robert B Burns	Dane H Watkins Jr
		TCORONA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Burns Concrete, Inc (defendant) Receipt number: 0029334 Dated: 7/11/2016 Amount: $136.00 (Check) For: Burns Concrete, Inc (defendant)	Dane H Watkins Jr
7/21/2016	NOAP	TCORONA	Defendant: Canyon Cove Development Company LLP Notice Of Appearance Robert B Burns	Dane H Watkins Jr
		TCORONA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Canyon Cove Development Company LLP (defendant) Receipt number: 0031134 Dated: 7/21/2016 Amount: $136.00 (Check) For: Canyon Cove Development Company LLP (defendant)	Dane H Watkins Jr
7/22/2016	ANSW	JNICHOLS	Answer	Dane H Watkins Jr
8/16/2016	HRSC	CARTER	Hearing Scheduled (Scheduling Conference 10/13/2016 08:30 AM)	Dane H Watkins Jr
		CARTER	Notice of Hearing	Dane H Watkins Jr
8/22/2016	HRSC	CARTER	Hearing Scheduled (Motion 09/22/2016 09:30 AM) P - Mtn Partial Summary Judgment	Dane H Watkins Jr

Nora A Mulberry, TN Properties LLC vs. Burns Concrete, Inc., an Idaho Corporation, Canyon Cove Development Company LLP

Date	Code	User		Judge
8/22/2016	NOAP	TCORONA	Plaintiff: Mulberry, Nora A Notice Of Appearance Dina L Sallak	Dane H Watkins Jr
	NOAP	TCORONA	Plaintiff: TN Properties LLC Notice Of Appearance Dina L Sallak	Dane H Watkins Jr
	MOTN	TCORONA	Motion For Partial Summary Judgment	Dane H Watkins Jr
	MEMO	TCORONA	Memorandum In Support Of Motion For Partial Summary Judgment	Dane H Watkins Jr
	NTOS	TCORONA	Notice Of Service Defendants' Third Supplemental Answers And Responses To Plaintiff's First Set Of Interrogatories And Requests For Production	Dane H Watkins Jr
8/23/2016	NOTH	CPETERSON	Notice Of Hearing 09/22/2016 @ 9:30 AM RE: Plaintiffs' Motion for Partial Summary Judgment	Dane H Watkins Jr
9/7/2016	MOTN	CEARLY	Motion For Leave To Appear Telephonically For Scheduling Conference	Dane H Watkins Jr
	ORDR	CEARLY	Order Granting Motion For Leave To Appear Telephonically	Dane H Watkins Jr
9/8/2016	AFFD	TCORONA	Affidavit Of Linda Wilkins	Dane H Watkins Jr
	AFFD	TCORONA	Affidavit Of Kirk Burns	Dane H Watkins Jr
	MEMO	TCORONA	Memorandum In Opposition To Plaintiffs' Motion For Partial Summary Judgment	Dane H Watkins Jr
9/12/2016	ORDR	CEARLY	Order Granting Motion For Leave To Appear Telephonically	Dane H Watkins Jr
	MOTN	CEARLY	Motion For Leave To Appear Telephonically For Hearing On Summary Judgment	Dane H Watkins Jr
9/22/2016	MINE	CARTER	Minute Entry Hearing type: Motion Hearing date: 9/22/2016 Time: 9:00 am Courtroom: Court reporter: Minutes Clerk: Cassie Carter Tape Number: Party: Burns Concrete, Inc, Attorney: Robert Burns Party: Canyon Cove Development Company LLP, Attorney: Robert Burns Party: Nora Mulberry, Attorney: Dina Sallak Party: TN Properties LLC, Attorney: Dina Sallak	Dane H Watkins Jr
	DCHH	CARTER	Hearing result for Motion scheduled on 09/22/2016 09:30 AM: District Court Hearing Hel Court Reporter: Amy Bland Number of Transcript Pages for this hearing estimated: P - Mtn Partial Summary Judgment	Dane H Watkins Jr

Nora A Mulberry, TN Properties LLC vs. Burns Concrete, Inc., an Idaho Corporation, Canyon Cove Development Company LLP

Date	Code	User		Judge
10/13/2016	MINE	CARTER	Minute Entry Hearing type: Scheduling Conference Hearing date: 10/13/2016 Time: 9:09 am Courtroom: Court reporter: Minutes Clerk: Cassie Carter Tape Number: Party: Burns Concrete, Inc, Attorney: Robert Burns Party: Canyon Cove Development Company LLP, Attorney: Robert Burns Party: Nora Mulberry, Attorney: Dina Sallak Party: TN Properties LLC, Attorney: Dina Sallak	Dane H Watkins Jr
	DCHH	CARTER	Hearing result for Scheduling Conference scheduled on 10/13/2016 08:30 AM: District Court Hearing Held Court Reporter: Amy Bland Number of Transcript Pages for this hearing estimated:	Dane H Watkins Jr
11/10/2016	MEMO	CARTER	Memorandum Decision and Order RE: Motion for Partial Summary Judgment	Dane H Watkins Jr
12/30/2016	MOTN	TCORONA	Defendant's Motion For Reconsideration Of Memorandum Decision And Order Re: Motion For Partial Summary Judgment	Dane H Watkins Jr
	MEMO	TCORONA	Memorandum In Support Of Defendant's Motion For Reconsideration	Dane H Watkins Jr
1/11/2017	HRSC	CARTER	Hearing Scheduled (Motion 03/02/2017 09:00 AM) D - Mtn for Reconsideration	Dane H Watkins Jr
1/12/2017	MOTN	CARTER	Motion for Leave to Appear Telephonically for Hearing on Defendant's Motion for Reconsideration of Memorandum Decision and Order RE: Motion for Partial Summary Judgment	Dane H Watkins Jr
	NOTH	CARTER	Notice Of Hearing RE: Motion for Reconsideration of Memorandum Decision and Order RE: Motion for Partial Summary Judgment	Dane H Watkins Jr
	MEMO	JNICHOLS	Memorandum In Opposition To Defendants' Motion For Reconsideration	Dane H Watkins Jr
1/13/2017	ORDR	CARTER	Order Granting Motion for Leave to Appear Telephonically	Dane H Watkins Jr
2/15/2017	AFFD	CPETERSON	Second Affidavit of Kirk Burns	Dane H Watkins Jr
2/24/2017	RESP	TCORONA	Reply In Support Of Defendants' Motion For Reconsideration	Dane H Watkins Jr
2/28/2017	MOTN	JNICHOLS	Plaintiffs Motion To Attend Motion Telephonically	Dane H Watkins Jr
3/2/2017	ORDR	CARTER	Order Granting Motion to Attend Hearing Telephonically	Dane H Watkins Jr

Nora A Mulberry, TN Properties LLC vs. Burns Concrete, Inc., an Idaho Corporation, Canyon Cove Development Company LLP

Date	Code	User		Judge
3/2/2017	MINE	CARTER	Minute Entry Hearing type: Motion Hearing date: 3/2/2017 Time: 9:01 am Courtroom: Court reporter: Minutes Clerk: Cassie Carter Tape Number: Party: Burns Concrete, Inc., an Idaho Corporation, Attorney: Robert Burns Party: Canyon Cove Development Company LLP, Attorney: Robert Burns Party: Nora Mulberry, Attorney: Dina Sallak Party: TN Properties LLC, Attorney: Dina Sallak	Dane H Watkins Jr
	DCHH	CARTER	Hearing result for Motion scheduled on 03/02/2017 09:00 AM: District Court Hearing Hel Court Reporter: Amy Bland Number of Transcript Pages for this hearing estimated: D - Mtn for Reconsideration	Dane H Watkins Jr
3/20/2017	MEMO	CARTER	Memorandum Decision And Order RE: Motion for Reconsideration	Dane H Watkins Jr
4/25/2017	MOTN	BJENNINGS	Plaintiff's Motion to Dismiss for Mootness of Remaining Claims	Dane H Watkins Jr
4/27/2017	ORDR	CARTER	Order Dismissing Plaintiffs' Remaining Claims as Moot	Dane H Watkins Jr
	JDMT	CARTER	Judgment	Dane H Watkins Jr
	STATUS	CARTER	Case Status Changed: Closed	Dane H Watkins Jr
	CDIS	CARTER	Civil Disposition entered for: Burns Concrete, Inc., an Idaho Corporation,, Defendant; Canyon Cove Development Company LLP, Defendant; Mulberry, Nora A, Plaintiff; TN Properties LLC, Plaintiff. Filing date: 4/27/2017	Dane H Watkins Jr
5/4/2017	STIP	TCORONA	Stipulation Extending time for Defendants' Response To Plaintiffs' Memorandum Of Costs	Dane H Watkins Jr
	STIP	TCORONA	Stipulation Extending Time For Defendants' Response To Plaintiffs' Memorandum Of Costs	Dane H Watkins Jr
5/10/2017	MOTN	TCORONA	Plaintiff's Motion For Costs And Attorney's Fees	Dane H Watkins Jr
	MEMO	TCORONA	Memorandum Of Costs	Dane H Watkins Jr
	AFFD	TCORONA	Affidavit Of Dina L Sallak In Support Of Plaintiff's Motion For Costs And Attorney's Fees And Memorandum Of Costs	Dane H Watkins Jr
6/5/2017		TCORONA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Burns, Robert B (attorney for Burns Concrete, Inc., an Idaho Corporation,) Receipt number: 0025786 Dated: 6/5/2017 Amount: $129.00 (Check) For: Burns Concrete, Inc., an Idaho Corporation, (defendant)	Dane H Watkins Jr

Nora A Mulberry, TN Properties LLC vs. Burns Concrete, Inc., an Idaho Corporation, Canyon Cove Development Company LLP

Date	Code	User		Judge
6/5/2017	BNDC	TCORONA	Bond Posted - Cash (Receipt 25798 Dated 6/5/2017 for 100.00)	Dane H Watkins Jr
	STATUS	TCORONA	Case Status Changed: Closed pending clerk action	Dane H Watkins Jr
	NOTC	TCORONA	Notice Of Appeal	Dane H Watkins Jr
	APSC	TCORONA	Appealed To The Supreme Court	Dane H Watkins Jr
6/6/2017	MOTN	CPETERSON	Defendant's Motion of Defendants to Disallow Costs and Attorney Fees	Dane H Watkins Jr
6/8/2017	HRSC	CARTER	Hearing Scheduled (Motion 07/20/2017 08:30 AM) Motion of Defendants to Disallow Costs and Attorney Fees	Dane H Watkins Jr
	MOTN	CARTER	Motion For Leave to Appear Telephonically for Hearing on Motion of Defendants to Disallow Costs and Attorney Fees	Dane H Watkins Jr
	NOTH	CARTER	Notice Of Hearing RE: Motion of Defendants to Disallow Costs and Attorney Fees	Dane H Watkins Jr
6/14/2017	ORDR	CEARLY	Order Granting Motion For Leave To Appear Telephonically	Dane H Watkins Jr
	CERTAP	ABIRCH	Clerk's Certificate of Appeal	Dane H Watkins Jr
	APSC	ABIRCH	Appealed To The Supreme Court	Dane H Watkins Jr
6/30/2017	MEMO	TCORONA	Memorandum In Support Of Motion Of Defendants To Disallow Costs And Attorney Fees	Dane H Watkins Jr
7/13/2017	RESP	CPETERSON	Plaintiff's Reply in Support of Motion for Costs and Attorney's Fees and Motion to Strike Defendants' Memoarndum in Support of Motion to Disallow Costs and Attorneys Fees and	Dane H Watkins Jr
7/18/2017		BJENNINGS	Reply in Support of Motion of Defendants to Disallow Costs and Attorney Fees	Dane H Watkins Jr
	NOTC	CPETERSON	Plaintiff's Notice of Attorney Name Change	Dane H Watkins Jr
7/20/2017	MINE	CARTER	Minute Entry Hearing type: Motion Hearing date: 7/20/2017 Time: 8:30 am Courtroom: Court reporter: Minutes Clerk: Cassie Carter Tape Number: Party: Burns Concrete, Inc., an Idaho Corporation, Attorney: Robert Burns Party: Canyon Cove Development Company LLP, Attorney: Robert Burns Party: Nora Mulberry, Attorney: Dina Sallak-Windes Party: TN Properties LLC, Attorney: Dina Sallak-Windes	Dane H Watkins Jr

Nora A Mulberry, TN Properties LLC vs. Burns Concrete, Inc., an Idaho Corporation, Canyon Cove Development Company LLP

Date	Code	User		Judge
7/20/2017	DCHH	CARTER	Hearing result for Motion scheduled on 07/20/2017 08:30 AM: District Court Hearing Hel(Court Reporter: Amy Bland Number of Transcript Pages for this hearing estimated: Motion of Defendants to Disallow Costs and Attorney Fees	Dane H Watkins Jr
7/27/2017	MEMO	ABARNES	Memorandum Decision and Order Re: Attorney Fees and Costs $11,673.50	Dane H Watkins Jr
8/2/2017	NOTC	TCORONA	Amended Notice Of Appeal	Dane H Watkins Jr
8/18/2017	NOTC	BJENNINGS	Notice of Firm Change (Carey Romankiw)	Dane H Watkins Jr

Donald F. Carey, ISB No. 4392
Lindsey R. Romankiw, ISB No. 2468
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P. O. Box 51388
Idaho Falls, Idaho 83402-4918
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Attorneys for Plaintiffs

ORIGINAL

IN THE DISTRICT COURT OF
THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC,

Plaintiffs,

vs.

BURNS CONCRETE INC., and CANYON COVE DEVELOPMENT COMPANY, LLP,

Defendants.

Case No. CV-16-3413

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, Nora A. Mulberry, by and through her counsel Carey Perkins LLP, for a cause of action alleges as follows:

1. That Nora A. Mulberry is a resident of Bonneville County, Idaho. She is the sole owner of TN Properties LLC, an Idaho limited liability company.

2. The properties at issue in this Declaratory Judgment action are located in Bonneville County, Idaho.

3. The Defendant, Burns Concrete, Inc., has its primary place of business located in Bonneville County, Idaho.

4. The Defendant, Canyon Cove Development Company, LLP, has its principal place of business located in Bonneville County, Idaho.

5. Venue is of this action is proper in Bonneville County, Idaho.

6. This court has subject matter jurisdiction over this dispute pursuant to Idaho Code section 10-1201 *et seq*.

7. The court has personal jurisdiction over these Defendants.

8. That TN Properties LLC, owns properties listed in that certain warranty deed attached hereto and incorporated by reference as Exhibit 1. At issue in this litigation are those properties described as "Parcel One" and "Parcel Two."

9. That previously Nora A. Mulberry, and her husband Theodore "Ted" E. Mulberry, (deceased) were the owners of a certain property identified more specifically in attached Exhibit 2. That on or about January 26, 1999, Plaintiff, Nora A. Mulberry, and her husband entered into a Commercial/Investment Real Estate Purchase And Sale Agreement with an entity identified as Canyon Cove Development Company ("Canyon Cove"), a limited partnership. See Exhibit 3. The real estate at issue in said Exhibit 3 is the real estate that is more fully described in attached Exhibit 2. The agreed purchase price for said real estate was $515,000. *Id.*

10. Plaintiff Nora A. Mulberry, and her deceased husband, Theodore "Ted" E. Mulberry attended a closing for the property listed in exhibit 2, on March 18, 1999. At closing, and at no time prior to closing, sellers were presented with a document styled "Addendum" which set forth additional terms and conditions of the sale, one of which was the granting of a First Right of Refusal. See Exhibit 4. The actual terms of the First Right of Refusal were memorialized in a

separate document styled "Undivided Right of First Refusal to Acquire Interest in Real Property." See Exhibit 5. The First Right of Refusal is dated March 18, 1999, the exact date of closing of the real estate transaction memorialized in Exhibit 3.

11. The Undivided Right of First Refusal to Acquire Interest in Real Property, Exhibit 5, may encumber those parcels listed as Parcel 1 and Parcel 2, set forth on Exhibit 1 to this Complaint.

12. Twelve days after the closing of the real estate sale set forth above, on or about March 30, 1999, Canyon Cove assigned its rights and obligations to defendant, Burns Concrete, Inc., under that certain farm lease dated March 18, 1999, the Undivided Right of First Refusal attached hereto and incorporated by reference as Exhibit 5, and the obligations and responsibilities of Canyon Cove, LLP under the foregoing instruments, together with an agreement to indemnify Canyon Cove of any liability which may result as a result of Burns' failure to comply with the obligations hereunder. See Exhibit 6.

13. Petitioners contend that there was a failure of consideration with respect to the Undivided Right of First Refusal to Acquire Interest in Real Property, for property which was not the subject matter of the initial real estate transaction between the Plaintiff, Nora A. Mullberry, and her deceased husband, Theodore "Ted" E. Mulberry, and Canyon Cove. Therefore, Plaintiff contends that the Undivided Right of First Refusal is void or voidable for failure of consideration.

14. Petitioner contends that the manner in which the Addendum, Exhibit 4, and the Undivided Right of First Refusal, Exhibit 5, were presented, at closing, and with no prior notice and without any real opportunity to have those documents reviewed by counsel, and without any opportunity to seek independent consultation of the effect of that Undivided Right of First Refusal

on the adjacent properties not otherwise the subject of the real estate transaction was and is unconscionable as a matter of equity, and should be set aside.

15. In the alternative, Plaintiff contends that the Undivided Right of First Refusal, by its terms only implicates properties referenced therein in the context of a "sale" and is not effective nor is it binding on any subsequent owners of the property who take by inter vivos gift, or through a bequest made in a testamentary instrument, or by intestate succession.

16. The subject land sale was a commercial transaction by its definition. Plaintiff should be awarded attorneys fees and costs pursuant to Idaho Code §§ 10-1210, 12-120(3), 12-121, 12-123, and Rule 54(d)(I) of the Idaho Rules of Civil Procedure.

PRAYER FOR RELIEF

Wherefore Petitioner prays for an Order of this Court as follows:

1. Finding that the Undivided Right of First Refusal is void or voidable for failure of consideration;

2. Finding that the Undivided Right of First Refusal to Acquire Interest in Real Property is void based on equity given the unconscionable manner of its presentation;

3. Finding that if not void based on failure of consideration or based on equity, that its affect is limited to sales of the subject property, and is in no way binding on inter vivos gift transfers or intestate succession owners of the affected property;

4. For an award of attorneys fees and costs pursuant to Idaho Code §§ 10-1210, 12-120(3), 12-121, 12-123, I.R.C.P. 54(d)(i).

5. For other and further relief as the Court deems appropriate under the circumstances.

DATED this 15th day of June, 2016

CAREY PERKINS LLP

By _____
Donald F. Carey, Of the Firm
Attorneys for Plaintiffs

VERIFICATION

STATE OF IDAHO)
: ss.
County of Bonneville)

Nora A. Mulberry, being first duly sworn upon oath, deposes and states:

That she is the Plaintiff and the owner of TN Properties LLC in the above-entitled action, that she has read the foregoing Verified Complaint and for Declaratory Judgment, and based upon her information and belief, the allegations contained therein are true.

_____
Nora A. Mulberry

SUBSCRIBED AND SWORN to before me this 15th day of June, 2016.

(SEAL)

STEPHANIE WHITE
NOTARY PUBLIC
STATE OF IDAHO

_____
Notary Public for Idaho
Residing at Bonneville County
Commission expires 10/20/20

Exhibit 1

BONNEVILLE COUNTY RECORDER
196121 AUG17'05 PM 4 27

WARRANTY DEED

1. **Date**

Aug. 17, 2005.

2. **Parties**

Grantor: Theodore E. Mulberry and Nora Mulberry (a/k/a Nora A. Mulberry), husband and wife.

Current Address: 2521 W. 81 S., Idaho Falls, ID 83402

Grantee: TN Properties LLC, an Idaho limited liability company.

Current Address: 2521 W. 81 S., Idaho Falls, ID 83402

3. **Property**

Idaho County: Bonneville

Transferred interest: Grantors entire fee simple

Description:

Parcel 1 – Home place

Beginning at a point 25 feet South and 25 feet West of the Northeast corner of Section 15, Township 1 North, Range 37 East of the Boise Meridian, in Idaho; thence South 1751.28 feet, paralleling Section line between Sections 14 and 15; thence at right angles to said Section line and West 2483.7 feet to a point in the East line of the Oregon Short Line Railroad right of way; thence Northeasterly along said right of way line 2019 feet; thence East and parallel to North line of Section 15, 1496 feet, more or less, to the point of beginning, containing 80 acres, more or less.

Parcel 2 – South Place

Beginning at a point 25 feet West and 1776.28 feet South of the Northeast corner of Section 15, in Township 1 North, Range 37 East of the Boise Meridian, thence continuing South paralleling the East line of Section 15, 888.72 feet, more or less, to the Southeast corner of the Northeast Quarter of said Section 15, thence West 2895 feet to a point in the East line of the Oregon Short Line Railroad right of way, thence Northeasterly along said right of way line 1024.6 feet, thence in an Easterly direction 2483.7 feet to the place of beginning, containing 56.8 acres, more or less.

Parcel 3 – Quigg Farm

Beginning at the Southwest corner of Section 15, Township 1 North, Range 37 E.B.M., and running thence East along the South line of said section to the intersection thereof with the Westerly line of the right of way of the Oregon Short Line Railroad; thence Northeasterly along the West line of said railroad right of way, approximately 1561 feet to the intersection thereof with the West line of the East Half of the Southwest Quarter (E1/2SW1/4) of said Section 15, thence North along the West line of the East Half of the West Half (E1/2W1/2) of said Section 15, approximately 2486 feet to its intersection with the Southerly line of the right of way of the Snake River Valley Canal; thence in a Southwesterly direction along the Southerly line of said right of way of the said Snake River Valley Canal to the diversion gates on said canal which are located within Lot 1 of Section 16, Township and Range aforesaid, thence in a Southeasterly direction along the Easterly line of the right of way of said canal to its intersection with the South line of said Section 16, thence East on the South line of said Section 16, approximately 480 feet to the place of beginning. Subject to easements and highways. (The property located in Section 16 above, is within the boundaries of Bingham County.)

LESS:

Commencing at the Southwest Corner of Section Fifteen (15), Township One (1) North, Range Thirty-Seven (37) East, Boise Meridian, and running South 89°29' East 515.68 feet along the South side of Section Fifteen (15); thence North 28°53'45" East 66.56 feet to the TRUE POINT OF BEGINNING, thence North 28°53'45" East 188.74 feet; thence North 66°48'30" West 313.46 feet; thence South 23°11'30" West 296.68 feet; thence South 87°05' East 314.16 feet to the TRUE POINT OF BEGINNING.

The above described land contains 1.68 acres more or less.

LESS:

Part of Section 15, Township 1 North, Range 37 East of the Boise Baseline and Meridian, Bonneville County, Idaho described as:

Beginning at a point that is N00°02'50"W 2151.62 feet along the Section line and N32°06'03"E 572.32 feet from the Southwest Corner of said Section 15, and running thence S89°20'47"E 250.00 feet; thence North 316.09 feet; thence S46°46'26"W 178.85 feet; thence S32°06'03"W 225.17 feet to the point of beginning.

TOGETHER WITH a 50 foot wide easement all on the Southerly and Westerly sides of the following described line:

Beginning at a point that is N00°02'50"W 2151.62 feet along the Section line and N32°06'03"E 572.32 feet and S89°20'47"E 200.00 feet, all from the Southwest Corner of Section 15, Township 1 North, Range 37 East of the Boise Baseline and Meridian, Bonneville County, Idaho, and running thence S89°20'47"E 813.99 feet to the East line of the West Half of the Southwest Quarter of said Section 15; thence S00°00'39"E along said East line to its intersection with the Northerly right of way line of U.S. Highway 91.

Parcel 4

Exhibit 2

EXHIBIT "A"

Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho.

Section 11: W1/2 E1/2 SW1/4, and

The East 1155 feet of the West Half of the Southwest Quarter.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTIES:

a. Beginning at the Southwest Corner of Section 11, Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho; and running N89°48'E 501.45 feet along the South side of Section 11 to the TRUE POINT OF BEGINNING; thence N89°48'E 290.80 feet along said Section line; thence North 362.40 feet; thence N79°30'W 165.10 feet; thence N88°00'W 128.55 feet; thence South 397.99 feet to the point of beginning.

b. Beginning at the Southwest Corner of Section 11, Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho; and running thence N89°48'E 185.42 feet along the South side of said Section 11 to the TRUE POINT OF BEGINNING; thence N89°48'E 316.00 feet along said Section line; thence North 397.99 feet; thence N82°28'20"W 319.74 feet; thence S0°07'40"E 440.98 feet to the true point of beginning.

c. Beginning at the Southwest Corner of Section 11, Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho; and running N89°48'E 185.42 feet along the South side of said Section 11 to the TRUE POINT OF BEGINNING; which point is also the Southwest Corner of that parcel of realty described by that certain Warranty deed dated May 9, 1983, recorded May 11, 1983 as Instrument No. 641822 of the public records of said Bonneville County, Idaho; thence N0°07'40"W 440.98 feet to the Northwest Corner of said realty; thence West 20 feet, more or less, to the Western boundary of that parcel of realty described by that certain Warranty deed dated December 21, 1989, recorded the same date as Instrument No. 778822 of the public records of said Bonneville County, Idaho; thence S0°17'08"W along said Western boundary 441 feet, more or less, to the Southwest Corner of said parcel of realty; thence N89°48'E along the Southern boundary of said parcel of realty 20.5 feet, more or less, to the true point of beginning.

d. Beginning at a point that is S89°48'00"W 911.66 feet along the Section line from the South Quarter Corner of Section 11, Township 1 North, Range 37 East of the Boise Baseline and Meridian, Bonneville County, Idaho, running thence N00°12'00"W 239.50 feet; thence N89°49'39"W 181.44 feet; thence S00°12'00"E 240.68 feet to the Section line; thence N89°48'00"E 181.44 feet to the point of beginning.

Exhibit 3

COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT

REALTOR®

EQUAL HOUSING OPPORTUNITY

ID# 45017 Idaho Falls, Idaho JAN 26, 19 99

1. **REAL ESTATE OFFICES:**

Listing Agency _____ Selling Agency Kepler Realty

Listing Agent Name _____ Selling Agent Name W.O. Kepler

Phone # (Office) _____ (Home) _____ Phone # (Office) _____ (Home) _____

2. **REPRESENTATION CONFIRMATION:**

In this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER ("agent" or "nonagent" or "limited dual agent"):

Listing broker acted as a(n) _____ For the buyer.

Selling broker acted as a(n) Customer For the buyer.

In this transaction, the brokerage(s) involved had the following relationship(s) with the SELLER ("agent" or "nonagent" or "limited dual agent"):

Listing broker acted as a(n) _____ For the Seller.

Selling broker acted as a(n) Customer For the Seller.

Each party signing this document confirms that he or she has received, read and understood the Agency Disclosure brochure and has elected the relationship confirmed above. In addition, each party confirms that the broker's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE OR SHE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKER UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

3. **BUYER:** Canyon Cove A Limited Partnership (hereinafter called "Buyer") agrees to purchase and the undersigned Seller agrees to sell the following described real estate hereinafter referred to as "Property."

4. **PROPERTY ADDRESS AND LEGAL DESCRIPTION:** The Property commonly known as Mulberry Farm 103.178 Acres More or less City of Idaho Falls County of Bonn, Idaho legally described as $515,000

PP OIN 37 E 11 SW 1/4 103.178 Acres +/- Tax # 15533

5. **PRICE/TERMS:** Total Purchase Price is Five Hundred Thousand And no/100 Dollars ($ 500,000.00).

a) $ ~~$100,000.00~~ / 415,000.00 cash down payment, including Earnest Money deposit.

b) $ ~~$400,000.~~ Balance of the purchase price to be paid as follows: 10 year Contract At 7% Fixed Interest, No Pre-Payment Penalties, Buyer has Right To Assign Contract.

6. **EARNEST MONEY:**

a) Buyer hereby deposits as Earnest Money and a receipt is hereby acknowledged of Five Thousand And no/100 Dollars ($ 5,000.00). Evidenced by: ☐ Cash ☒ Check ☐ Cashier's Check ☐ Note or _____

b) Earnest Money to be deposited in trust account upon acceptance by all parties and shall be held by Kepler Realty for the benefit of the parties hereto. The responsible Broker shall be W.O. Kepler

7. **INCLUDED ITEMS:** All attached floor coverings, attached television antennae, satellite dish(es) and receiving equipment, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm windows, storm doors, window coverings, water heating

PROPERTY ADDRESS: 99 OIN 37E 11 Sw 1/4 ID# 45017

11. **ESCROW/COLLECTION:** If a long-term escrow/collection is involved, then the escrow/collection holder shall be _____. Each party agrees to pay one-half of escrow/collection fees.

12. **CLOSING DATE:** On or before the closing date, Buyer and Seller shall deposit with the Closing Agency all funds and instruments necessary to complete the sale. The closing date shall be no later than March 4th 1999. "Closing Date" means the date on which all documents are either recorded or accepted by an escrow/collection agency and the sale proceeds are available to Seller.

13. **POSSESSION/PRORATION:** Buyer shall be entitled to possession on the day of closing or Date of Close. Taxes and water assessments (using the last available assessment as a basis), rents, insurance premiums, interest and reserve on liens, encumbrances or obligations assumed and utilities shall be prorated as of the day of closing or Seller To Pay All 1998. Any tenant deposits held by Seller shall be credited to Buyer at closing.

14. **DEFAULT:** **If Buyer defaults** in the performance of this Agreement, Seller has the option: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right or remedy to which Seller may be entitled. If Seller elects to proceed under (1), Seller shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by Seller's Broker on behalf of Seller and Buyer related to the transaction, including, without limitation, the costs of title insurance, escrow fees, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to Seller and one-half to Seller's Broker, provided that the amount to be paid to Seller's Broker shall not exceed the Broker's agreed to commission. Seller and Buyer specifically acknowledge and agree that if Seller elects to accept the Earnest Money as liquidated damages, such shall be Seller's sole and exclusive remedy, and such shall not be considered a penalty or forfeiture. If Seller elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by Seller's Broker on behalf of Seller and Buyer related to the transaction, including, without limitation, the costs of brokerage fee, title insurance, escrow fees, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the matter. **If Seller defaults**, having approved said sale and fails to consummate the same as herein agreed, Buyer's Earnest Money deposit shall be returned to him/her and Seller shall pay for the costs of title insurance, escrow fees, credit report fees, inspection fees, brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by Buyer of any other lawful right or remedy to which Buyer may be entitled.

15. **EARNEST MONEY DISPUTE / INTERPLEADER:** Notwithstanding any termination of this contract, Buyer and Seller agree that in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties and deposit any moneys or things of value into a court of competent jurisdiction and shall recover court costs and reasonable attorney's fees.

16. **TITLE CONVEYANCE:** Title of Seller is to be conveyed by warranty deed or _____ deed, and is to be marketable and insurable except for rights reserved in federal patents, building or use restrictions, building and zoning regulations and ordinances of any governmental unit, rights of way and easements established or of record and any other liens, encumbrances or defects approved by Buyer.

17. **RISK OF LOSS:** Should the Property be materially damaged by fire or other cause prior to closing, unless Buyer has taken possession prior to closing by Agreement, this Agreement shall be voidable at the option of Buyer.

18. **CONDITION OF PROPERTY AT CLOSING:** Buyer agrees to purchase the Property in as is condition, where is, with all faults. Buyer will assume all obligations with respect to the Property. Seller shall maintain the Property until the closing in its present condition, ordinary wear and tear excepted, and loss by casualty. The heating, ventilating, air conditioning, plumbing, elevators, loading doors and electrical systems shall be in present operating order and condition at the time of closing, unless otherwise agreed to in writing.

19. **INSPECTION:** Buyer hereby acknowledges further that Buyer has not received or relied upon any statements or representations by the Broker or Broker's representatives or by Seller which are not herein expressed. Buyer has entered into this Agreement relying upon information and knowledge obtained from Buyer's own investigation or personal inspection of the Property.

20. **ADDITIONAL PROVISIONS:** Additional provisions of this Real Estate Purchase and Sale Agreement, if any, are attached hereto by an Addendum consisting of N/A page(s).

21. **NOTARY PUBLIC:** It is recommended signatures be notarized with a notary statement attached hereto.

22. **ENTIRE AGREEMENT:** This Agreement, including any Addendums or exhibits, constitutes the entire Agreement between the parties and no warranties, including any warranty of habitability, Agreements or representations have been made or shall be binding upon either party unless herein set forth.

23. **TIME IS OF THE ESSENCE IN THIS AGREEMENT.**

24. **ACCEPTANCE:** Buyer's offer is made subject to the acceptance of Seller on or before (Date) 27 JAN 1999 and (Time) 12 pm

If Seller does not accept this A

Exhibit 4

ADDENDUM

COPY

This Addendum is executed to clarify the terms of the Commercial Investment Real Estate Purchase and Sale Agreement dated January 26, 1999, with Theodore E. Mulberry and Nora A. Mulberry, husband and wife, and Michael Mulberry and Ina Sue Mulberry, husband and wife, as Sellers, and Canyon Cove Development Company, LLP, as Buyer.

1. Irrigation System.

Approximately one-third (1/3) of the property is irrigated from a pump (the South Pump) that lies south of the road, and delivers water to the subject property through a buried mainline. The remaining portion of the property is irrigated by a diesel pump (the North Pump) that draws water from the ditch along the north end of the property. Sellers agree to install a buried mainline from the North Pump to provide water to the portion of the property which is presently irrigated from the South Pump. If the North Pump is insufficient to provide water pressure to the entire property that is within the specifications for the wheel lines, Sellers shall install a larger diesel pump sufficient to provide such water at Sellers' own expense, in which case Sellers may retain the existing diesel pump. Seller shall complete the requirements of this paragraph by November 1, 1999.

2. Prior Encumbrance.

A. The Property is subject to a mortgage in favor of Farm Credit Service (the "Encumbrance"). Buyer does not assume the Encumbrance. Sellers agree to pay all of the remaining payments of principal and interest due under the Encumbrance, promptly when the same are required to be paid as set forth in the Escrow Agreement. Sellers also agree to make prepayments on the Encumbrance as set forth in the Escrow Agreement. If Buyer shall prepay all or any portion of the balance owing to Sellers hereunder, Sellers agree to prepay seventy-five percent (75%) of said amount as a prepayment on the Encumbrance. Sellers shall pay and discharge the same not later than the date of Buyer's final payment to Sellers hereunder (whether such be by regularly scheduled installments or by prepayment). Upon full payment of the Encumbrance, should Sellers fail to do so, Sellers hereby nominate and appoint Buyer as Sellers' attorney-in-fact, with full power and authority to demand and receive of any mortgagees or escrow holder, and place of record any and all documents necessary to clear the Encumbrance of record, to the same extent as Sellers could have personally done.

B. Sellers authorize the mortgagee to disclose to Buyer any information requested by Buyer with respect to the status of the loan account secured by the Encumbrance, including without limitation the balance remaining due, whether payments are

current and the amount of any delinquency in payments, the balances held in any reserve accounts, and any other information reasonably necessary in order for Buyer to determine whether Sellers have performed Sellers' covenants as set forth in the preceding paragraph.

C. Should Sellers for any reason breach the covenants set forth herein, and should Sellers thereby be in default in payment of any amount due upon the debt secured by the Encumbrance, Buyer shall have the right to pay such money as shall be necessary in order to correct such default, and prevent a foreclosure of the Encumbrance (although Buyer shall not be obligated to do so). Should Buyer pay any money to correct Sellers' said default and to prevent a foreclosure of the Encumbrance, Buyer shall be credited in like amount, as of the date such payment was so made by Buyer. The making of any such payment by Buyer to correct Sellers' default shall not be deemed a waiver of Buyer's right to bring an appropriate legal action against Sellers by reason of Sellers' breach of this contract in permitting such default to occur.

D. If Buyer should do any act that constitutes a breach under the Encumbrance, Buyer shall be required to correct such breach or to pay the Encumbrance. Buyer shall indemnify Sellers of any cost or liability including reasonable attorney fees, which Sellers may be required to pay to the mortgage holder as a result of Buyer's default.

3. Environmental.

A. Seller represents that as of the date of execution of this agreement Seller has no knowledge, after due investigation, of any failure to comply with applicable local, State and Federal environmental laws, regulations, ordinances and administrative or judicial orders relating to the generation, recycling, reuse, sale, storage, handling, transport and disposal of any hazardous substances, on or involved in or associated with the use of the Property.

B. Seller has no knowledge, after due investigation, of the presence of any hazardous substances or toxic substances or hazardous or toxic emissions, or of any spills, releases, discharge or disposal of any hazardous substances that have occurred or are presently occurring on the Property.

C. Seller warrants that there are no petroleum or other storage tanks buried on the Property.

D. For purposes of this agreement, "hazardous substances", "toxic substances" or "hazardous" or "toxic" emissions shall mean any substance or material defined or designated as hazardous or toxic waste, hazardous or toxic material, hazardous, toxic or radioactive substance or other similar term by any federal, state or local environmental

statute, regulation or ordinance presently in effect or that may be promulgated in the future, and shall include petroleum or petroleum based products.

4. **Right of First Refusal.** The parties agree to execute a Right of First Refusal in the form attached hereto.

5. **Lease Agreement.** The parties agree to execute a Lease Agreement in the form attached hereto.

Dated this 18 day of March, 1999.

Theodore E. Mulberry
Theodore E. Mulberry

Nora A. Mulberry
Nora A. Mulberry

Michael Mulberry
Michael Mulberry

Ina Sue Mulberry
Ina Sue Mulberry

CANYON COVE DEVELOPMENT COMPANY, LLP

By: Linda Wilkins
Linda Wilkins, Managing Partner

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 18th day of March, 1999, before me, the undersigned, a notary public in and for said State, personally appeared Theodore E. Mulberry and Nora A. Mulberry, husband and wife, known or identified to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1/28/2003

(seal)

NOTARY PUBLIC
LENORE J. KATRI
STATE OF IDAHO

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 18th day of March, 1999, before me, the undersigned, a notary public in and for said State, personally appeared Michael Mulberry and Ina Sue Mulberry, husband and wife, known or identified to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1/28/2003

(seal)

NOTARY PUBLIC
LENORE J. KATRI
STATE OF IDAHO

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 18th day of March, 1999, before me the undersigned, a notary public in and for said State, personally appeared Linda Wilkins, known or identified to me to be one of the partners in the partnership of Canyon Cove Development Company, LLP, and the partner or one of the partners who subscribed said partnership name to the foregoing instrument, and acknowledged to me that she executed the same in said partnership name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1/28/2003

(seal)

NOTARY PUBLIC
LENORE J. KATRI
STATE OF IDAHO
Residing at Idaho Falls, Idaho
My Commission Expires Jan. 28, 2003

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Exhibit 5

BCT T-14896
99/908

UNDIVIDED RIGHT OF FIRST REFUSAL TO ACQUIRE INTEREST IN REAL PROPERTY

This Right of First Refusal is made and entered into as of the 18 day of March, 1999, by and between Theodore E. Mulberry and Nora A. Mulberry, husband and wife, as Sellers, and Canyon Cove Development Company, LLP, as Buyers.

WITNESSETH

1. For adequate consideration, Sellers hereby grant to the Buyer a right of first refusal to acquire the Sellers' undivided interest in and to the real property hereafter described on the same terms, conditions, and provisions as the Sellers might intend to sell and convey said interest to any third person hereafter.

2. Should the Sellers hereafter intend to sell in good faith and convey said premises they will first offer the same to the Buyer by a written notice containing all of the terms, conditions, and provisions by which they intend to sell in good faith the same to said third person. Buyer shall then have five (5) days from the date such notice is received to accept or refuse said offer.

3. Should the Buyer decline the offer, and the sale to the third party, for any reason not occur, then this option of first refusal should then be renewed and shall apply to any subsequent sale to a third party.

4. Shall Buyer fail or refuse to accept any such offer within their time limit stated, then any interest of Buyer in the subject property shall cease and terminate as to the sale to the intended third party should it occur. This option agreement may be recorded in Bonneville County, Idaho. Thereafter, Sellers may record a notice in Bonneville County, Idaho, showing the date on which they gave their notice to Buyers, in order to give record notice of the beginning of the stated notice time period.

5. The real property to which this option of first refusal applies is located in Bonneville County and is described as follows:

Sellers' right, title and interest in and to:

Beginning at a point 25 feet West and 1776.28 feet South of the Northeast corner of Section 15, in Township 1 North, Range 37 East of the Boise Meridian, thence continuing South paralleling the East line of said Section 15, 888.72 feet, more or less, to the

Southeast corner of the N.E. 1/4 of said Section 15; thence West 2895 feet to a point in the East line of the Oregon Short Line Railroad right of way, thence Northeasterly along said right of way line 1024.6 feet, thence in an Easterly direction 2483.7 feet to the place of beginning. ALSO: Beginning at a point 25 feet South and 25 feet West of the Northeast corner of Section 15, Township 1 North, Range 37 East of the Boise Meridian; thence South 1751.28 feet, paralleling Section line between Sections 14 and 15, thence right angles to said Section line and West 2483.7 feet to a point in the East line of the Oregon Short Line Railroad right of way; thence Northeasterly along said right of way line 2091 feet; thence East and parallel to North line of Section 15, 1496 feet to the place of beginning.

SUBJECT TO:

a. General taxes for the year 1999 and all subsequent years.

b. These premises are situated within the boundaries of the Idaho Irrigation District and are subject to the assessments thereof for the year 1999 and all subsequent years.

c. All easements and rights-of-way of record or those appearing on the land which affect the described property.

d. Patent reservations, mineral, oil, gravel, and other reservations, all building codes, laws, and zoning ordinances affecting the described premises.

Dated this 18 date of March, 1999.

Theodore E. Mulberry

Theodore E. Mulberry

Nora A. Mulberry

Nora A. Mulberry

CANYON COVE DEVELOPMENT
COMPANY, LLP

By: _____
Linda Wilkins, Managing Partner

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 18th day of March, 1999, before me, the undersigned, a notary public in and for said State, personally appeared Theodore E. Mulberry and Nora A. Mulberry, husband and wife, known or identified to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

_____
Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1/28/2003

(seal)

NOTARY PUBLIC
LENORE J. KATRI
STATE OF IDAHO
Residing at Idaho Falls
My Commission Expires

INSTRUMENT NO. 991908
DATE 3-19-99
INST. CODE 998
IMAGED PGS 4
FEE 12-
STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss
I hereby certify that the within instrument was recorded.
Ronald Longmore,
County Recorder
By _____ Deputy
Request of

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 18th day of March, 1999, before me the undersigned, a notary public in and for said State, personally appeared Linda Wilkins, known or identified to me to be one of the partners in the partnership of Canyon Cove Development Company, LLP, and the partner or one of the partners who subscribed said partnership name to the foregoing instrument, and acknowledged to me that she executed the same in said partnership name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Lenore J. Katri

Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1/28/2003

(seal)

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NOTARY PUBLIC
LENORE J. KATRI
STATE OF IDAHO
Residing at Idaho Falls, Idaho
My Commission Expires Jan 28 2003

Exhibit 6

This instrument was not recorded until 9/30/1999, not recorded to C
1090210 08-27-02

BONNEVILLE COUNTY RECORDER

ASSIGNMENT AND ASSUMPTION 1090210 SEP27'02 PM 4 23

Canyon Cove Development Company, LLP, an Idaho limited liability partnership, hereby assigns to Burns Concrete, Inc., an Idaho corporation, all of its rights and obligations under the following instruments:

1. Idaho Farm Lease dated the 18th day of March, 1999, with Canyon Cove Development Company, LLP, as landlord, and Theodore E. Mulberry and Nora A. Mulberry, husband and wife, and Michael Mulberry and Ina Sue Mulberry, husband and wife, as tenant.

2. Undivided Right of First Refusal to Acquire Interest in Real Property, with Theodore E. Mulberry and Nora A. Mulberry, husband and wife, as sellers, and Canyon Cove Development Company, LLP, as buyers. Said Undivided Right of First Refusal to Acquire Interest in Real Property pertains to the following described real property:

> Beginning at a point 25 feet West and 1776.28 feet South of the Northeast corner of Section 15, in Township 1 North, Range 37 East of the Boise Meridian, thence continuing South paralleling the East line of said Section 15, 888.72 feet, more or less, to the Southeast corner of the N.E. 1/4 of said Section 15; thence West 2895 feet to a point in the East line of the Oregon Short Line Railroad right of way, thence Northeasterly along said right of way line 1024.6 feet, thence in an Easterly direction 2483.7 feet to the place of beginning. ALSO: Beginning at a point 25 feet South and 25 feet West of the Northeast corner of Section 15, Township 1 North, Range 37 East of the Boise Meridian; thence South 1751.28 feet, paralleling Section line between Sections 14 and 15, thence right angles to said Section line and West 2483.7 feet to a point in the East line of the Oregon Short Line Railroad right of way; thence Northeasterly along said right of way line 2091 feet; thence East and parallel to North line of Section 15, 1496 feet to the place of beginning.

3. Burns Concrete, Inc. hereby assumes all obligations and responsibilities of Canyon Cove Development Company, LLP, under the foregoing instruments and hereby agrees to indemnify and hold harmless Canyon Cove Development Company, LLP, of any liability which may accrue to it as a result of Burns' failure to comply with its obligations hereunder.

Dated this ____ day of March, 1999.

CANYON COVE DEVELOPMENT
COMPANY, LLP

By: _____
Linda Wilkins, Managing Partner

BURNS CONCRETE, INC.

By: _____
Kirk Burns, President

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 30th day of March, 1999, before me the undersigned, a notary public in and for said State, personally appeared Linda Wilkins, known or identified to me to be one of the partners in the partnership of Canyon Cove Development Company, LLP, and the partner or one of the partners who subscribed said partnership name to the foregoing instrument, and acknowledged to me that she executed the same in said partnership name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(seal) NOTARY PUBLIC
GARY L. MEIKLE
STATE OF IDAHO
Residing at Idaho Falls, Idaho
My Commission Expires Dec 13, 2003

_____
Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 12/13/2003

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 30th day of March, 1999, before me, the undersigned, a notary public in and for said State, personally appeared Kirk Burns, known or identified to me to be the president of the corporation that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

NOTARY PUBLIC
GARY L. MEIKLE
STATE OF IDAHO
Residing at Idaho Falls, Idaho
My Commission Expires Dec. 13, 2003

(seal)

Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 12/13/2003

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INSTRUMENT NO. 1090210
DATE 9-27-02
INST. CODE 820
IMAGED PGS 3
FEE 9.00
STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss
I hereby certify that the within instrument was recorded.
Ronald Longmore,
County Recorder
By M Gelling Deputy
Request of Holden Kidwell

Robert B. Burns, ISB No. 3744
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702
Telephone: (208) 562-4900
Facsimile: (208) 562-4901
Email: rburns@parsonsbehle.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-16-3413 **ANSWER**

Defendants Burns Concrete, Inc. and Canyon Cove Development Company, LLP (jointly, "Defendants") deny each and every averment contained in the Verified Complaint for Declaratory Judgment (the "Complaint"), filed June 29, 2016, by Plaintiffs Nora A. Mulberry and TN Properties LLC (jointly, "Plaintiffs"), not expressly admitted below.

1. Defendants admit the allegations in paragraphs 1-9 of the Complaint.

2. In response to paragraph 10 of the Complaint, Defendants admit (a) that Plaintiff Nora A. Mulberry and her deceased husband executed the Addendum attached as Exhibit 4 to the

Complaint (the "Addendum"), which sets forth additional terms and conditions of the property sale memorialized in the Commercial/Investment Real Estate Purchase and Sale Agreement attached as Exhibit 3 to the Complaint (the "PSA"), one of which additional terms and conditions was the granting of an option on the terms set forth in the Undivided Right of First Refusal to Acquire Interest in Real Property attached as Exhibit 5 to the Complaint (the "Right of first Refusal"), and (b) that all parties to the Addendum and the Right of First Refusal executed each of these documents on March 18, 1999, in connection with and on the day prior to the recording of the Warranty Deed and other recorded documents that were executed to effect the closing of the real estate transaction memorialized in the PSA. Defendants are without knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 10 of the Complaint.

3. In response to paragraph 11 of the Complaint, Defendants admit that the Right of First Refusal encumbers the real property described as Parcel 1 and Parcel 2 in Exhibit 1 to the Complaint (the "Option Property").

4. Defendants admit the allegations in paragraph 12 of the Complaint.

5. In response to paragraph 13 of the Complaint, Defendants admit that Plaintiffs contend what they state they contend but deny that there was a failure of consideration with respect to the Right of First Refusal and that it is void or voidable for failure of consideration.

6. In response to paragraph 14 of the Complaint, Defendants admit that Plaintiffs contend what they state they contend but deny that the manner and timing by which the Addendum and Right of First Refusal were presented was unconscionable and should be set aside.

7. In response to paragraph 15 of the Complaint, Defendants admit that the Right of First Refusal is only enforceable in the context of a sale of the Option Property, but deny that the Right of First Refusal is not effective or binding with respect to a sale by any owners of the Option

Property who obtain title by inter vivos gift, through a bequest made in a testamentary instrument, or by intestate succession.

8. In response to paragraph 16 of the Complaint, Defendants admit that the proposed land sale under the PSA was a commercial transaction, but deny that Plaintiffs should be awarded any attorney's fees or costs.

AFFIRMATIVE DEFENSES

9. Plaintiffs have failed to state a claim upon which relief can be granted.

10. Plaintiffs' claims are barred because the PSA was unenforceable by Plaintiff Nora A. Mulberry and her deceased husband for multiple independent reasons, including (a) for lack of inclusion in the PSA of an adequate legal description, (b) for Mr. and Mrs. Mulberry's failure to close the subject transaction by the March 4, 1999, closing date specified in Section 12 of the PSA, and (c) for the inability of Mr. and Mrs. Mulberry to convey marketable title to the land being sold under the PSA in compliance with the requirements specified in Section 16 of the PSA, with Defendant Canyon Cove Development Company, LLP ("Canyon Cove") instead having to accept title subject to a mortgage for the benefit of Northwest Farm Credit Services, ACA, securing a principal indebtedness in the amount of $210,700 (the "Encumbrance"), which remained an encumbrance on the land until released ten years after Canyon Cove's acquistion. Thus, Mr. and Mrs. Mulberry's determination to close the subject transaction on the terms set forth in the Addendum and the Right of First Refusal was made to induce Canyon Cove to close a transaction with respect to which it had no obligation to close.

11. Plaintiffs' claims are barred because the PSA was unenforceable by Canyon Cove for lack of inclusion in the PSA of an adequate legal description. Thus, Mr. and Mrs. Mulberry's determination to close the subject transaction on the terms set forth in the Addendum and the Right of First Refusal was made when they had no obligation to close and for the purpose of obtaining the

additional consideration under the following two provisions in the Addendum from that provided under the terms of the PSA: Section 2.A—Canyon Cove's acceptance of the land it purchased subject to the Encumbrance; and Section 5—Canyon Cove's lease of the land it purchased to Mr. and Mrs. Mulberry's son and daughter-in-law Michael and Ina Sue Mulberry.

12. Plaintiffs' claims are barred by the doctrines of quasi-estoppel, equitable estoppel and/or promissory estoppel.

13. Plaintiffs' claims are barred by the doctrine of laches.

ATTORNEY FEES

14. Defendants have been required to engage legal counsel to defend against the claims made by Plaintiffs, which arise out of a commercial transaction, and Defendants are therefore entitled to recover the reasonable attorney fees they incur pursuant to Idaho Code Sections 12-120(3), 12-120, and 12-123.

PRAYER

WHEREFORE, Defendants pray for judgment as follows:

1. for the Complaint to be dismissed with prejudice and Plaintiffs to take nothing thereby;

2. for an award of Defendants' reasonable attorney fees and costs; and

3. for such other and further relief as the Court may determine to be just and proper.

DATED this 22nd day of July 2016.

PARSONS BEHLE & LATIMER

By _____
Robert B. Burns
Attorneys for Defendants

JURY DEMAND

Defendants demand that all issues that are by right triable to a jury be heard and decided by a jury of 12 persons.

DATED this 22nd day of July 2016.

PARSONS BEHLE & LATIMER

By _____
Robert B. Burns
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of July 2016, a true and correct copy of the within and foregoing instrument was served upon:

Donald F. Carey
Lindsey R. Romankiw
Carey Perkins LLP
980 Pier View Drive, Suite B
P.O. Box 51388
Idaho Falls, Idaho 83402-4918

- ☐ U.S. Mail
- ☒ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Delivery
- ☐ Email:

Robert B. Burns

ANSWER - 6
21813.000\4848-0520-8373 v1

Robert B. Burns, ISB No. 3744
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702
Telephone: (208) 562-4900
Facsimile: (208) 562-4901
Email: rburns@parsonsbehle.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-16-3413 **AFFIDAVIT OF KIRK BURNS**

STATE OF IDAHO)
) ss.
County of Bonneville)

I, KIRK BURNS, being duly sworn upon oath, depose and state as follows:

1. I am and was at all times relevant to the claims pleaded in the above-captioned lawsuit the president of Burns Concrete, Inc., one of the two defendants in this lawsuit.

2. Pursuant to that certain Assignment and Assumption attached as Exhibit 6 to the Verified Complaint for Declaratory Judgment filed in this lawsuit, Burns Concrete, Inc. was

assigned all of the interest of the other defendant in this lawsuit, Canyon Cove Development Company, LLP, in that certain Undivided Right of First Refusal to Acquire Interest in Real Property (the "ROFR") attached as Exhibit 5 to the complaint.

3. At no time was Burns Concrete, Inc. provided with written notice by anybody that it might purchase the real property described in the ROFR.

4. At no time before the current calendar year did Burns Concrete, Inc. receive written notice or otherwise learn that Nora Mulberry and her now deceased husband had conveyed the real property described in the ROFR to their entity TN Properties LLC.

DATED this 6 day of September 2016.

KIRK BURNS

SUBSCRIBED AND SWORN to before me this 6 day of September 2016.

LINDA JEAN SZIMHARDT NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at Idaho Falls, Bonneville County
My Commission Expires October 6, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of September 2016, a true and correct copy of the within and foregoing instrument was served upon:

Donald F. Carey
Dina L. Sallak
Lindsey R. Romankiw
Carey Perkins LLP
980 Pier View Drive, Suite B
P.O. Box 51388
Idaho Falls, Idaho 83402-4918

- [x] U.S. Mail
- [x] Facsimile
- [ ] Hand Delivery
- [ ] Overnight Delivery
- [ ] Email:

Robert B. Burns

Robert B. Burns, ISB No. 3744
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-16-3413 **AFFIDAVIT OF LINDA WILKINS**

STATE OF IDAHO)
) ss.
County of Bonneville)

I, LINDA WILKINS, being duly sworn upon oath, depose and state as follows:

1. I am and was at all times relevant to the claims pleaded in the above-captioned lawsuit the managing partner of Canyon Cove Development Company, LLP, one of the two defendants in this lawsuit.

2.Pursuant to that certain Assignment and Assumption attached as Exhibit 6 to the Verified Complaint for Declaratory Judgment filed in this lawsuit, Canyon Cove Development Company, LLP assigned all of its interest in that certain Undivided Right of First Refusal to Acquire Interest in Real Property (the "ROFR") attached as Exhibit 5 to the complaint to the other defendant in this lawsuit, Burns Concrete, Inc.

3.At no time was Canyon Cove Development Company, LLP provided with written notice by anybody that it might purchase the real property described in the ROFR.

4.At no time before the current calendar year did Canyon Cove Development Company, LLP receive written notice or otherwise learn that Nora Mulberry and her now deceased husband had conveyed the real property described in the ROFR to their entity TN Properties LLC.

DATED this 6th day of September 2016.

Linda Wilkins

LINDA WILKINS

SUBSCRIBED AND SWORN to before me this 6 day of September 2016.

LINDA JEAN SZIMHAROT NOTARY PUBLIC STATE OF IDAHO

Linda Jean Szimharot

NOTARY PUBLIC FOR IDAHO
Residing at Idaho Falls, Bonneville County
My Commission Expires October 6, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of September 2016, a true and correct copy of the within and foregoing instrument was served upon:

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Robert B. Burns

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES, LLC, Plaintiffs, vs. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-2016-3413 **MEMORANDUM DECISION AND ORDER RE: MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 1999, Theodore E. Mulberry, Nora M. Mulberry, Michael Mulberry and Ina Mulberry, sold land to Canyon Cove Development Company (Canyon Cove) under a Commercial Investment Real Estate Purchase and Sale Agreement (PSA). At closing on March 18, 1999, the parties executed an addendum to the PSA, clarifying the PSA's terms. A right of first refusal (ROFR) for a parcel of land owned by Theodore and Nora Mulberry, separate from that parcel sold to Canyon Cove, was executed at the same time. The ROFR provides:

1. For adequate consideration, Sellers hereby grant to the Buyer a right of first refusal to acquire the Sellers' undivided interest in and to the real property hereafter described on the same terms, conditions, and provisions as the Sellers might intend to sell and convey said interest to any third person hereafter.

2. Should the Sellers hereafter intend to sell in good faith and convey said premises they will first offer the same to the Buyer by a written notice containing all of the terms, conditions, and provisions by which they intend to sell in good faith the same to said third person. Buyer shall then have five (5) days from the date such notice is received to accept or refuse said offer.

Verified Compl. for Declaratory J., Ex. 5.

On or about March 30, 1999, Canyon Cove assigned its interest in the ROFR to Burns Concrete, Inc. (Burns).

Theodore and Nora Mulberry conveyed the land subject to the ROFR to TN Properties, LLC, in August 2005. Theodore passed away sometime subsequent to that transfer. Nora is now the sole owner of TN Properties.

Plaintiffs filed a Verified Complaint for Declaratory Judgment on June 29, 2016 and a Motion for Partial Summary Judgment on August 22, 2016.

Defendants filed a Memorandum In Opposition To Plaintiffs' Motion For Partial Summary Judgment on September 8, 2016.

This Court heard arguments on the motion for summary judgment on September 22, 2016. At the hearing, the Court agreed to allow additional time for settlement discussions and briefing. Following a status conference on October 13, 2016, this Court took the motion for summary judgment under advisement.

II. STANDARD OF ADJUDICATION

A. Motion for Summary Judgment

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). *See Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105; *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2002). The burden is, at all times, on the moving party to demonstrate the absence of a genuine issue of material fact. *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001).

The United States Supreme Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct.

2548 (1986), stated:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide the claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Id. at 323, 106 S.Ct. at 2553 (alterations in original).

When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. American Cleaning Services, Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). Liberal construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Madrid v. Roth*, 134 Idaho 802, 10 P.3d 751 (Ct. App. 2000).

The Idaho appellate courts have followed the United States Supreme Court's decision in *Celotex*, which stated:

> Summary judgment procedure is properly regarded not as a disfavored procedural

> shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." ...Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327, 106 S.Ct. at 2555 (citations omitted); *see Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002); *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002).

A party against whom a summary judgment is sought cannot merely rest on his pleadings but, when faced with affidavits or depositions supporting the motion, must come forward by way of affidavit, deposition, admissions or other documentation to establish the existence of material issues of fact, which preclude the issuance of summary judgment. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001); *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000). The non-moving party's case, however, must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2001).

The moving party is entitled to judgment when the non-moving party fails to make a sufficient showing as to the essential elements to which that party will bear the burden of proof at trial. *Primary Health Network, Inc. v. State, Dept. of Admin.*, 137 Idaho 663, 52 P.3d 307 (2002). Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018, (1998). In such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.*

> Generally, the trial court is not permitted to weigh the evidence or resolve controverted factual issues when ruling on a motion for summary judgment. *AID Ins. Co. v. Armstrong,* 119 Idaho 897, 900, 811 P.2d 507, 510 (Ct.App.1991). However, where the "evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). *See also AID Ins. Co.,* 119 Idaho at 900, 811 P.2d at 510 (if the court will be the ultimate finder of fact, both parties have moved for summary judgment and the motions are based on the same evidentiary facts, then "summary judgment is appropriate even though conflicting inferences are possible, so long as all the evidence is confined entirely to the record"); *Blackmon v. Zufelt,* 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct.App.1985) (when the judge will be the trier of fact, he or she is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts).

Small v. State, 132 Idaho 327, 334, 971 P.2d 1151, 1158 (Ct. App. 1998); *accord Drew v. Sorensen,* 133 Idaho 534, 539, 989 P.2d 276, 281 (1999).

B. Declaratory Judgment

Idaho Code § 10-1201 provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Idaho Code § 10-1202 provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

III. DISCUSSION

Plaintiffs seek a declaratory judgment that the ROFR "was personal to the parties and is not binding on Ted and Nora Mulberry's heirs, successors, devisees, or assigns, nor can it benefit Burns Concrete." Mem. in Support of M. for Partial Summ. J. at 4. Plaintiffs argue that the

ROFR is unambiguous and that under its plain language it only bound Ted and Nora Mulberry. They contend that the ROFR's language does not support any interpretation that it would bind the Mulberrys' heirs, successors or assigns. Plaintiffs further argue that the ROFR only mentions Canyon Cove and that it cannot be interpreted as permitting an assignment to Burns. They ask that this Court declare the ROFR was terminated upon Canyon Cove's assignment of it to Burns.

Defendants respond that a right of first refusal is not personal to the parties in Idaho. Defendants assert that all non-personal contract rights may be assigned. *Citing Sinclair Mktg., Inc. v. Siepert,* 107 Idaho 1000, 1002, 695 P.2d 385, 387 (1985). Defendants raise several additional arguments in opposition to Plaintiffs' motion. Defendants argue that Plaintiffs' action is not ripe for adjudication. Defendants contend that the doctrine of quasi estoppel bars Plaintiffs from benefitting from the Mulberrys' conveyance of the property to TN Properties. Defendants add that the doctrine of laches precludes Plaintiffs from now nullifying their contractual obligations under the ROFR.

A. Ripeness

Defendants argue that Plaintiffs' action is not ripe for adjudication because there is no evidence that any sale of the property is currently being contemplated. Defendants cite *ABC Agra, LLC v. Critical Access Group, Inc.,* 156 Idaho 781, 331 P.3d 523 (2014).

> Idaho courts have the power to declare the rights, status and legal relations of persons affected by contracts. I.C. §§ 10–1201 & 1202. Breach of a contract is not required for the issuance of a declaratory judgment regarding a contract dispute. I.C. § 10–1203; *Utah Power & Light Co. v. Idaho Pub. Utils. Comm'n,* 112 Idaho 10, 12, 730 P.2d 930, 932 (1986) (noting that Idaho Code section § 10–1203 "provides for the issuance of a declaratory judgment in a contract dispute 'before or after there has been a breach.' ") However, an actual or justiciable controversy is still a prerequisite to a declaratory judgment action; thus, courts are precluded "from deciding cases which are purely hypothetical or advisory." *Bettwieser v. N.Y. Irrigation Dist.,* 154 Idaho 317, 326, 297 P.3d 1134, 1143 (2013) (quoting *Wylie v. Idaho Transp. Bd.,* 151 Idaho 26, 31, 253 P.3d 700, 705 (2011)). Idaho has adopted the constitutionally based federal justiciability standard. *Davidson v.*

> *Wright,* 143 Idaho 616, 620, 151 P.3d 812, 816 (2006). Ripeness is that part of justiciability that "asks whether there is any need for court action at the present time." *Id.* (quoting *Gibbons v. Cenarrusa,* 140 Idaho 316, 317, 92 P.3d 1063, 1064 (2002)). "The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Paddison Scenic Props., Family Trust, L.C. v. Idaho Cnty.,* 153 Idaho 1, 4, 278 P.3d 403, 406 (2012) (quoting *Noh v. Cenarrusa,* 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002)).

Id. at 783, 331 P.3d at 525 (note omitted).

> "Generally, in determining whether to grant a declaratory judgment, the criteria is whether it will clarify and settle the legal relations at issue, and whether such declaration will afford a leave from uncertainty and controversy giving rise to the proceeding." *Miles,* 116 Idaho at 642, 778 P.2d at 764 (quoting *Sweeney v. American Natl. Bank,* 62 Idaho 544, 115 P.2d 109 (1941)). If deferring the adjudication "would add nothing material to the legal issues presented" so that a court will be in no better position in the future and if a declaration of the rights of parties will "certainly afford a relief from uncertainty and controversy in the future" the case may be presently ripe for adjudication. *Id.*

Schneider v. Howe, 142 Idaho 767, 773, 133 P.3d 1232, 1238 (2006)

In *ABC Agra,* ABC was the developer of a large scale planned unit development. In 2007, St. Benedict's hospital executed an option agreement to purchase a lot in the PUD for the construction of a new hospital. Under the agreement, if St. Benedict's purchased the lot, ABC would gift them two neighboring lots for construction of the hospital. The agreement restricted the use of the three lots solely for the construction of healthcare facilities. The agreement was binding on St. Benedict's successors and assigns. In 2011, St. Benedict's conveyed its lots to Critical Access Group, Inc. (CAG). ABC sent CAG a letter, informing it of the restricted use placed on the lots. CAG responded that it was aware of ABC's position that the lots had a restricted use covenant and also stating "The fact that CAG is aware of your client's previous position should not be interpreted as a statement that CAG agrees with such positions." *ABC Agra,* 156 Idaho at 782, 331 P.3d at 524. ABC then filed a complaint for declaratory relief seeking a declaration that only a healthcare facility could be constructed on the three lots. The

district court held that the claim was not ripe because the controversy involved "uncertain or contingent future events that may not occur as anticipated or indeed may not occur at all." *Id.* The Idaho Supreme Court affirmed the district court.

ABC argued that there was a present need for adjudication because the uncertainty regarding the lots' restricted use harmed its ability to market the remainder of the PUD. CAG responded that because there were no facts that would indicate that it planned to build anything other than a healthcare facility, there was no real and substantial controversy. In affirming the district court, the Supreme Court held:

> In order for there to be a justiciable controversy there must be more than a difference or dispute of a hypothetical or abstract character. *Davidson,* 143 Idaho at 620, 151 P.3d at 816. Accordingly, "a litigant seeking a declaratory judgment must demonstrate that an actual controversy exists and that the requested relief will provide actual relief, not merely potential relief."

Id. at 784, 331 P.3d at 526. "[A] remote contingency is not sufficient to satisfy the requirements for a justiciable controversy." *Wylie v. Idaho Transp. Bd.,* 151 Idaho 26, 34, 253 P.3d 700, 708 (2011). The Court in *ABC* noted that the facts in that case were distinguishable from those in the 9th Circuit case of *Principal Life Ins. Co. v. Robinson,* 394 F.3d 665, 671 (9th Cir.2005), where a disagreement arose between the parties to a long-term lease. One of the parties was unable to sell its interest because of the disagreement. The 9th Circuit held the case was ripe for adjudication. The *ABC* Court noted that in *Robinson* there "was no question as to the presence of a disputed term in the contract." *Id.* at 785, 331 P.3d at 527. The Court then distinguished *Robinson* by indicating that *ABC* lacked a clear contractual dispute similar to that which existed in *Robinson:*

> [A] clear dispute existed in Robinson. It was not merely an allegation that the parties likely would not agree on the meaning of the renegotiation term in the lease if the leasehold interest was ever sold, *but that the parties presently did not agree on its meaning,* had memorialized the disagreement, and the disagreement had actually prevented the sale of the leasehold. No similar facts exist here. ABC

> simply alleges that CAG likely disagrees with its interpretation of the restrictive covenant and this disagreement may affect its ability to market ABC's other properties.

Id. (emphasis added)

In *Schneider,* a case which involved a disagreement between the parties regarding whether an easement existed, the Idaho Supreme Court held the case was ripe for adjudication, explaining:

> Delaying the adjudication would add nothing material to the litigation and a court would be in no better position to decide the existence of the easement. A declaration regarding the existence of an easement will afford both Schneider and the Howes relief from uncertainty and controversy in the future.

Schneider v. Howe, 142 Idaho at 773, 133 P.3d at 1238. Similarly, in *Miles v. Idaho Power Company,* 116 Idaho 635, 778 P.2d 757 (1989), the Idaho Supreme Court held:

> Here, nothing can be gained by delaying adjudication of the issue. It is clear that this issue will be before us either now or in the future, and a declaration now of the various rights of the parties will certainly afford a relief from uncertainty and controversy in the future. "Since we are persuaded that 'we will be in no better position than we are now' to decide this question, we hold that it is presently ripe for adjudication." *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. at 82, 98 S.Ct. at 2635.

The facts in this case are more similar to those in *Robinson* than in *ABC.* Like in *Robinson*, the parties in this case plainly disagree regarding the terms of their contractual agreement. There is no question that the parties dispute whether the ROFR is binding on subsequent owners who obtained title by inter vivos gift, bequest, or intestate succession. Delaying adjudication in this case would not add anything material to the litigation. Neither can this Court perceive that it would be in any better position to decide the question of the ROFR's assignability at a future date. Rather, declaring whether the ROFR is assignable will afford both Mulberry and Defendants relief from uncertainty and controversy in the future. Consequently, the issue is presently ripe for adjudication.

B. Right to Assign the ROFR

1. Effect of Canyon Cove's Assignment of the ROFR to Burns

"Generally, all contract rights which are not 'personal' in nature may be assigned." *Sinclair Mktg., Inc. v. Siepert*, 107 Idaho 1000, 1002, 695 P.2d 385, 387 (1985), *quoting* WILLISTON ON CONTRACTS (3d ed.) § 412. Whether a right of first refusal is personal in nature appears to be a case of first impression in Idaho. Rights of first refusal are generally considered personal, however:

> Option contracts, as a general rule, are assignable. *Rights of first refusal are presumed to be personal, and are thus not assignable unless either the clause granting the right refers to successors or assigns or the instrument clearly shows that the right was intended to be assignable.* A right of first refusal to purchase real property is not assignable if the right does not run with the land *but is personal to the grantee*.

6A C.J.S. *Assignments* § 36 (emphasis added; notes omitted).

> The right of first refusal may be considered a personal contract, and as such, *when a right of first refusal is conveyed simultaneously with a parcel, the subsequent assignment and exercise of the right of first refusal may be void* as the right of first refusal does not run with the land, *but rather is personal to the grantee*, and *thus is extinguished when the property is conveyed.*

6 Am. Jur. 2d *Assignments* § 40 (emphasis added).

> Contracts that involve personal services, a special confidence, or the like, so as to make them nonassignable, include—
>
> . . .
>
> — the right of first refusal, unless the particular clause granting the right refers to successors or assigns or the instrument otherwise shows that the right was intended to be transferable or assignable.

6 Am. Jur. 2d *Assignments* § 28.

> When interpreting a written contract, this Court "begins with the language of the contract itself." *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007) (quoting *Independence Lead Mines Co. v. Hecla Mining Co.,* 143 Idaho 22, 26, 137 P.3d 409, 413 (2006)). If a contract's language is unambiguous, "then its meaning and legal effect must be determined from its

> words." *Id.* (citing *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 361, 93 P.3d 685, 692 (2004)). An ambiguous contract is one that is "reasonably subject to conflicting interpretations." *Id.* (quoting *Lamprecht v. Jordan, LLC,* 139 Idaho 182, 185, 75 P.3d 743, 746 (2003)). "Determining whether a contract is ambiguous is a question of law over which this Court exercises free review." *Id.*

Boise Mode, LLC v. Donahoe Pace & Partners Ltd., 154 Idaho 99, 108, 294 P.3d 1111, 1120 (2013)

The language of the ROFR in this case is plain and unambiguous. It does not make any reference to successors or assigns or give any indication that the ROFR was intended to be anything other than personal to the grantee. Consequently, the ROFR is presumed to be personal and non-assignable. Canyon Cove's assignment of the ROFR and conveyance of its interest under the March 18, 1999, lease agreement extinguished the ROFR.

Plaintiffs' motion for summary judgment seeking a declaratory judgment that the ROFR was personal to the parties and cannot benefit Burns Concrete should be granted. The ROFR was extinguished when Canyon Cove conveyed its interest in the properties to Burns.

2. Effect of the Mulberrys' Conveyance to TN Properties

Although a right of first refusal may be personal to the grantee. It is not personal to the grantor. "A transfer of property by gift from one family member to another does not trigger a right of first refusal." 92 C.J.S. Vendor and Purchaser § 180.

In *Isaacson v. First Sec. Bank of Utah,* 95 Idaho 452, 511 P.2d 269 (1973), the Idaho Supreme Court examined the impact of a gift of property subject to a right of first refusal. In that case, the defendant bank, as trustee for Thomas W. Richards, leased the subject property to Stanley and Twila Isaacson. The lease included a right of first refusal, as follows:

> 'In (the) event (lessor) desires to sell property included in this lease, (lessees) agree to yield and deliver up the said premises to (lessor), provided, however, that (lessees are) granted first right of refusal to purchase premises. It is understood that (lessees are) entitled to any crops that are in the process of growing at time of sale, should one occur.'

Id. at 452, 511 P.2d at 270.

Prior to the lease's termination, Thomas Richards, sold the subject property to his son, Melvin Richards, for $20,000. The lessee brought suit against Melvin for specific performance of their right of first refusal. The trial court determined that because the property was valued at $60,000 to $70,000, the transfer of property to Melvin was more in the nature of a gift and not a sale as contemplated by the lease agreement.

On appeal, the Idaho Supreme Court affirmed:

> As in these cases, the transfer consummated here was not an open market sale resultant from 'arms' length' dealing; rather, the evidence indicates the occurrence of a transfer from father to son of property worth at least three times the amount of monetary consideration paid by the transferee. . .
>
> If the father had conferred an outright gift upon the son-i. e., had transferred the property in question to him for no consideration whatsoever-it could not be successfully contended that the appellants' right of first refusal would thereby have been triggered. Where the lessor has indicated his desire to give and not to sell the property subject to the right of first refusal, it cannot be said that the condition precedent to the ripening of the right of first refusal has been fulfilled.
>
> While the transaction at issue partook of the form of a sale, we have no doubt that the trial court was correct in concluding that the transfer was more of a gift than a sale. The district court correctly went behind the formal sales agreement and determined the actual nature of the transaction, which cannot properly be characterized as a 'sale' within the meaning of the contract entered into by the parties in this case.
>
> It is undeniable that by the transaction between the father's trustee and the son, the property was effectively transferred to a new owner; but this does not mean that the property was 'placed beyond the lessees' reach,' as they submit. *Had the donee desired to consummate a bona fide arm's length sale prior to [the end of his lease], he could not have done so without first offering the property to the lessees on the same terms he would have been willing to sell to anyone else. See Damiano v. Finney,* 93 Idaho 482, 464 P.2d 522 (1970). *Until the lease was terminated, the donee landlord's right to sell the property was subject to the lessee's right of first refusal contained in the lease agreement. Korehnke v. Zimmerman, supra; Straley v. Osborne,* 262 Md. 514, 278 A.2d 64 (1971); *Sand v. London & Co., supra. Therefore, the property was within the lessees' reach to the same extent that it always had been*-but their right to purchase would ripen only in the event the lessor desired to sell during the term of the leasehold. We note, moreover, that the effect upon the lessees-i. e., *a change in landlords-would*

have been the same if an unequivocal gift of the reversionary interest had taken place.

Id. at 454-55, 511 P.2d at 271-72 (emphasis added; notes omitted).

The ROFR in this case is triggered if "the Sellers hereafter intend to sell in good faith." Verified Compl. For Declaratory J., Ex. 5. The conveyance of property from the Mulberrys to TN Properties was not a sale. Therefore, it did not trigger the ROFR. If the ROFR was still valid at the time the property was conveyed to TN Properties, TN Properties, as donee, would be held subject to the ROFR in the same way that the Mulberrys were. However, Canyon Cove assigned the lease agreement and ROFR to Burns prior to the Mulberrys' conveyance. Therefore, the ROFR did not survive to bind TN Properties.

Plaintiffs' motion for summary judgment seeking a declaratory judgment that the ROFR was not binding on Ted and Nora Mulberry's heirs , successors, devisees, or assigns should be granted though not for the reason argued by Plaintiffs.

C. Quasi-Estoppel

Defendants argue that Nora and Theodore Mulberrys' conveyance of the property subject to the ROFR to a company now wholly owned by Nora constituted a breach of the covenant of food faith and fair dealing because it nullified or significantly impaired any benefit of the ROFR. Defendants argue that the doctrine of quasi-estoppel bars Mulberry from benefiting from her conduct.

As discussed above, the Mulberrys' conveyance of the property to TN Properties did not nullify or impair the ROFR. If Canyon Cove was still in possession of its rights under the ROFR, despite its attempted assignment of the ROFR to Burns, TN Properties was still subject to the terms of the ROFR. Consequently, Defendants' arguments pertaining to quasi-estoppel are moot.

D. Laches

Defendants argue that Plaintiffs are barred under the doctrine of laches from benefiting from their nullification of the ROFR by conveying the property to TN Properties.

Because the Mulberry's conveyance of the subject property to TN Properties did not nullify the ROFR, Defendants' argument pertaining to laches is moot.

IV. CONCLUSION AND ORDER

Plaintiffs' motion for summary judgment seeking a declaratory judgment that the ROFR was personal to the parties and cannot benefit Burns Concrete is granted. The ROFR was extinguished when Canyon Cove assigned the ROFR and conveyed its interest in the neighboring property to Burns.

Plaintiffs' motion for summary judgment seeking a declaratory judgment that the ROFR was not binding on Ted and Nora Mulberry's heirs, successors, devisees, or assigns is granted.

IT IS SO ORDERED.

DATED this 8 day of Nov 2016.

DANE H. WATKINS, JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of November 2016, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Dina L. Sallak
CAREY PERKINS, LLP
P.O. Box 51388
Idaho Falls, ID 83402

Robert B. Burns
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702

PENNY MANNING
Clerk of the District Court
Bonneville County, Idaho

By Carrie Grant
Deputy Clerk

Robert B. Burns, ISB No. 3744
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702
Telephone: (208) 562-4900
Facsimile: (208) 562-4901
Email: rburns@parsonsbehle.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-16-3413 **SECOND AFFIDAVIT OF KIRK BURNS**

STATE OF IDAHO)
) ss.
County of Bonneville)

I, KIRK BURNS, being duly sworn upon oath, depose and state as follows:

1. I am and was at all times relevant to the claims pleaded in the above-captioned action the president of Burns Concrete, Inc. ("Burns Concrete"), one of the two defendants in this lawsuit.

2. By the Warranty Deed attached hereto as **Exhibit A** Burns Concrete acquired from the other defendant in this lawsuit, Canyon Cove Development Company, LLP ("Canyon Cove"),

that certain real property (the "Purchased Property") previously owned by Nora A. Mulberry and her husband Theodore E. Mulberry (jointly, the "Mulberrys") referred to in paragraphs 9-10 and described in Exhibit 2 of the plaintiffs' Verified Complaint for Declaratory Judgment, filed June 29, 2016 (the "Complaint").

3. By the Assignment and Assumption attached hereto as **Exhibit B** Burns Concrete also acquired from Canyon Cove all of its interest in that certain Undivided Right of First Refusal to Acquire Interest in Real Property (the "ROFR") referred to in paragraphs 10-11 and appended as Exhibit 5 to the Complaint, which encumbered that certain real property (the "ROFR Property") previously owned by the Mulberrys, together with the landlord's interest in the farm lease of the Purchased Property to the Mulberrys.

4. As a result of Burns Concrete's ownership of the Purchased Property and its interest under the ROFR to acquire the ROFR Property, I am very familiar with the location, condition, and current and prospective uses of both the Purchased Property and ROFR Property.

5. The Purchased Property is located between and adjacent to two additional parcels (one 50 acres and the other 35 acres) owned by Burns Concrete, with all of the Purchased Property being on the north side of 81st South (Cotton Road) in Bonneville County and with four residential properties constructed along 81st South lying between it and the Purchased Property.

6. The ROFR Property is located across the road from Burns Concrete's 50-acre parcel on the south side of 81st South and to the west of the Purchased Property. Thus, not only is the ROFR Property not in any manner adjacent or physically "connected" to (nor directly across the road from) the Purchased Property, but the two properties share no common irrigation system or other utilities, have no common means of ingress or egress, and are subject to no common easements or restrictions by which one of the properties benefits the other. For these reasons, there is no

requirement for or benefit in the consistent use of the two properties, whether for farming, residential development, mining of aggregate materials, or otherwise.

7. For the foregoing reasons, neither the value nor the use of the Purchased Property (or, for that matter, any of Burns Concrete's additional acreage) would in any manner be enhanced by Burns Concrete's ownership of the ROFR Property, nor would the Purchased Property otherwise be benefitted by common ownership of it and the ROFR Property.

DATED this 3 day of February 2017.

By _____
KIRK BURNS

SUBSCRIBED AND SWORN to before me this 3 day of February, 2017.

_____
NOTARY PUBLIC FOR IDAHO
Residing at Bonneville County
My Commission Expires: 10/16/2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of February 2017, a true and correct copy of the within and foregoing instrument was served upon:

Donald F. Carey
Dina L. Sallak
Lindsey R. Romankiw
Carey Perkins LLP
980 Pier View Drive, Suite B
P.O. Box 51388
Idaho Falls, Idaho 83402-4918

- ☐ U.S. Mail
- ☒ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Delivery
- ☐ Email:

Robert B. Burns

BONNEVILLE COUNTY RECORDER
107 731 AUG10'00 PM 16

1028731
BONNEVILLE COUNTY RECORDER

CORRECTION

WARRANTY DEED

1003084 JUL29'99 PM 4 29

This instrument is rerecorded to include the legal description.

THIS INDENTURE is made this 30th day of March, 1999, by Canyon Cove Development Company, LLP, the Grantor, and Burns Concrete, Inc., the Grantee, whose mailing address is P. O. Box 1864, Idaho Falls, Idaho, 83403.

WITNESSETH, that the Grantor, for and in consideration of the sum of TEN DOLLARS ($10.00) lawful money of the United States of America, and other good and valuable consideration, to the Grantor in hand paid by the Grantee, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and by these presents does grant, bargain, sell, convey and confirm unto the Grantee, and to the Grantee's heirs and assigns forever, all of the following described property in the County of Bonneville, State of Idaho, to-wit:

See attached Exhibit "A"

SUBJECT to:

A. Mortgage given by Theodore E. Mulberry and Nora A. Mulberry, husband and wife, and Michael Mulberry and Ina Sue Mulberry, husband and wife, to Northwest Farm Credit Services, recorded as Instrument No. 910014, records of Bonneville County, Idaho.

B. Mortgage given by the Grantor to Theodore E. Mulberry and Nora A. Mulberry, husband and wife, and Michael Mulberry and Ina Sue Mulberry, recorded as Instrument No. 991906, records of Bonneville County, Idaho.

C. All existing easements or claims of easements, patent reservations, rights of way, protective covenants, zoning ordinances, and applicable building codes, laws and regulations, encroachments, overlaps, boundary line disputes and other matters which would be disclosed by an accurate survey or inspection of the premises.

TOGETHER with all water rights, fixtures, topsoils, gravel, mineral rights, sands, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and any reversions, any remainders, rents, issues and profits therefrom; and all estate, right, title and interest in and to the property, as well in law as in equity, of the Grantor.

EXHIBIT
A

TO HAVE AND TO HOLD the premises and the appurtenances unto the Grantee, and to the Grantee's heirs and assigns forever. The Grantor and the Grantor's heirs shall warrant and defend the premises in the quiet and peaceable possession of the Grantee and the Grantee's heirs and assigns, against the Grantor and the Grantor's heirs, and against every person whomsoever who lawfully holds (or who later lawfully claims to have held) rights in the premises as of the date hereof.

In construing this Warranty Deed and where the context so requires, the singular includes the plural.

IN WITNESS WHEREOF, the Grantor has executed the within instrument the day and year first above written.

INSTRUMENT NO. 100388
DATE 3-29-99
INST. CODE 205
IMAGED PGS 2
FEE 6
STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss
I hereby certify that the within instrument was recorded.
Ronald Longmore,
County Recorder
By STATE OF IDAHO Deputy
Request of Holden, Kidwell

CANYON COVE DEVELOPMENT COMPANY, LLC

By: _____
Linda Wilkins, its Managing Partner

County of Bonneville)

On the 30th day of March, 1999, before me the undersigned, a notary public in and for said State, personally appeared Linda Wilkins, known or identified to me to be one of the partners in the partnership of Canyon Cove Development Company, LLC, and the partner or one of the partners who subscribed said partnership name to the foregoing instrument, and acknowledged to me that she executed the same in said partnership name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC
GARY L. MEIKLE
STATE OF IDAHO
(seal) Residing at Idaho Falls, Idaho
My Commission Expires DEC 13, 2003

Q:\WPDATA\OLM\1700\BURN0209.WD:jhv/es

_____
Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 12/13/2003

INSTRUMENT NO. 1028737
DATE 8-10-00
DEPUT CODE 205
RECORDED FOR 3
FEE 9.-
STATE OF IDAHO }
COUNTY OF BONNEVILLE } ss
I hereby certify that the within instrument was recorded.
Ronald Longmore,
County Recorder
By _____ Deputy
Request of Holden Kidwell

EXHIBIT A

5. The land referred to in this Commitment is described as follows:

Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho.

Section 11: W1/2 E1/2 SW1/4, and

The East 1155 feet of the West Half of the Southwest Quarter.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTIES:

a. Beginning at the Southwest Corner of Section 11, Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho; and running N89°48'E 501.45 feet along the South side of Section 11 to the TRUE POINT OF BEGINNING; thence N89°48'E 290.80 feet along said Section line; thence North 362.40 feet; thence N79°30'W 165.10 feet; thence N88°00'W 128.55 feet; thence South 397.99 feet to the point of beginning.

b. Beginning at the Southwest Corner of Section 11, Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho; and running thence N89°48'E 185.42 feet along the South side of said Section 11 to the TRUE POINT OF BEGINNING; thence N89°48'E 316.00 feet along said Section line; thence North 397.99 feet; thence N82°28'20"W 319.74 feet; thence S0°07'40"E 440.98 feet to the true point of beginning.

c. Beginning at the Southwest Corner of Section 11, Township 1 North, Range 37 East of the Boise Meridian, Bonneville County, Idaho; and running N89°48'E 185.42 feet along the South side of said Section 11 to the TRUE POINT OF BEGINNING; which point is also the Southwest Corner of that parcel of realty described by that certain Warranty deed dated May 9, 1983, recorded May 11, 1983 as Instrument No. 641822 of the public records of said Bonneville County, Idaho; thence N0°07'40"W 440.98 feet to the Northwest Corner of said realty; thence West 20 feet, more or less, to the Western boundary of that parcel of realty described by that certain Warranty deed dated December 21, 1989, recorded the same date as Instrument No. 778822 of the public records of said Bonneville County, Idaho; thence S0°17'08"W along said Western boundary 441 feet, more or less, to the Southwest Corner of said parcel of realty; thence N89°48'E along the Southern boundary of said parcel of realty 20.5 feet, more or less, to the true point of beginning.

d. Beginning at a point that is S89°48'00"W 911.66 feet along the Section line from the South Quarter Corner of Section 11, Township 1 North, Range 37 East of the Boise Baseline and Meridian, Bonneville County, Idaho, running thence N00°12'00"W 239.50 feet; thence N89°49'39"W 181.44 feet; thence S00°12'00"E 240.68 feet to the Section line; thence N89°48'00"E 181.44 feet to the point of beginning.

Memorandum Mar. 30 1999, recorded as
1090210

BONNEVILLE COUNTY RECORDER

ASSIGNMENT AND ASSUMPTION 1090210 SEP27'02 PM 4 23

Canyon Cove Development Company, LLP, an Idaho limited liability partnership, hereby assigns to Burns Concrete, Inc., an Idaho corporation, all of its rights and obligations under the following instruments:

1. Idaho Farm Lease dated the 18th day of March, 1999, with Canyon Cove Development Company, LLP, as landlord, and Theodore E. Mulberry and Nora A. Mulberry, husband and wife, and Michael Mulberry and Ina Sue Mulberry, husband and wife, as tenant.

2. Undivided Right of First Refusal to Acquire Interest in Real Property, with Theodore E. Mulberry and Nora A. Mulberry, husband and wife, as sellers, and Canyon Cove Development Company, LLP, as buyers. Said Undivided Right of First Refusal to Acquire Interest in Real Property pertains to the following described real property:

> Beginning at a point 25 feet West and 1776.28 feet South of the Northeast corner of Section 15, in Township 1 North, Range 37 East of the Boise Meridian, thence continuing South paralleling the East line of said Section 15, 888.72 feet, more or less, to the Southeast corner of the N.E. 1/4 of said Section 15; thence West 2895 feet to a point in the East line of the Oregon Short Line Railroad right of way, thence Northeasterly along said right of way line 1024.6 feet, thence in an Easterly direction 2483.7 feet to the place of beginning. ALSO: Beginning at a point 25 feet South and 25 feet West of the Northeast corner of Section 15, Township 1 North, Range 37 East of the Boise Meridian; thence South 1751.28 feet, paralleling Section line between Sections 14 and 15, thence right angles to said Section line and West 2483.7 feet to a point in the East line of the Oregon Short Line Railroad right of way; thence Northeasterly along said right of way line 2091 feet; thence East and parallel to North line of Section 15, 1496 feet to the place of beginning.

3. Burns Concrete, Inc. hereby assumes all obligations and responsibilities of Canyon Cove Development Company, LLP, under the foregoing instruments and hereby agrees to indemnify and hold harmless Canyon Cove Development Company, LLP, of any liability which may accrue to it as a result of Burns' failure to comply with its obligations hereunder.

Dated this ____ day of March, 1999.

EXHIBIT B

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 30th day of March, 1999, before me, the undersigned, a notary public in and for said State, personally appeared Kirk Burns, known or identified to me to be the president of the corporation that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

NOTARY PUBLIC
GARY L. MEIKLE
STATE OF IDAHO
Residing at Idaho Falls, Idaho
My Commission Expires: Dec. 13, 2003

(seal) Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 12/13/2003

G:\WPDATA\GLM\1700\CANCOV.ASG:ss

INSTRUMENT NO. 1090210
DATE 9-27-02
INST. CODE 820
IMAGED PGS 3
FEE 9.00
STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss
I hereby certify that the within instrument was recorded.
Ronald Longmore,
County Recorder
By [illegible] Deputy
Request of Holden Kidwell

CANYON COVE DEVELOPMENT
COMPANY, LLP

By: _____
Linda Wilkins, Managing Partner

BURNS CONCRETE, INC.

By: _____
Kirk Burns, President

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 30th day of March, 1999, before me the undersigned, a notary public in and for said State, personally appeared Linda Wilkins, known or identified to me to be one of the partners in the partnership of Canyon Cove Development Company, LLP, and the partner or one of the partners who subscribed said partnership name to the foregoing instrument, and acknowledged to me that she executed the same in said partnership name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(seal) NOTARY PUBLIC
GARY L. MEIKLE
STATE OF IDAHO
Residing at Idaho Falls, Idaho
My Commission Expires Dec 13, 2003

_____
Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 12/13/2003

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES, LLC, Plaintiffs, vs. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-2016-3413 **MEMORANDUM DECISION AND ORDER RE: MOTION FOR RECONSIDERATION**

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 1999, Theodore E. Mulberry, Nora M. Mulberry, Michael Mulberry and Ina Mulberry, sold land (the "Purchased Property") to Canyon Cove Development Company ("Canyon Cove") under a Commercial Investment Real Estate Purchase and Sale Agreement ("PSA"). At closing on March 18, 1999, the parties executed an addendum to the PSA, clarifying the PSA's terms. A right of first refusal (ROFR) for a parcel of land (the "ROFR Property") owned by Theodore and Nora Mulberry, separate from that parcel sold to Canyon Cove, was executed at the same time. The ROFR provides:

1. For adequate consideration, Sellers hereby grant to the Buyer a right of first refusal to acquire the Sellers' undivided interest in and to the real property hereafter described on the same terms, conditions, and provisions as the Sellers might intend to sell and convey said interest to any third person hereafter.

2. Should the Sellers hereafter intend to sell in good faith and convey said premises they will first offer the same to the Buyer by a written notice containing all of the terms, conditions, and provisions by which they intend to sell in good faith the same to said third person. Buyer shall then have five (5) days from the date such notice is received to accept or refuse said offer.

Verified Compl. for Declaratory J., Ex. 5.

On or about March 30, 1999, Canyon Cove assigned its interest in both the Purchased Property and the ROFR to Burns Concrete, Inc. ("Burns").

Theodore and Nora Mulberry conveyed the land subject to the ROFR to TN Properties, LLC, in August 2005. Theodore passed away sometime subsequent to that transfer. Nora is now the sole owner of TN Properties.

Plaintiffs filed a Verified Complaint for Declaratory Judgment on June 29, 2016 and a Motion for Partial Summary Judgment on August 22, 2016.

Defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment on September 8, 2016.

On November 10, 2016, this Court entered a Memorandum Decision and Order declaring that the ROFR was personal to the Mulberrys and Canyon Cove and that the ROFR was extinguished when Canyon Cove assigned it to Burns. The Memorandum Decision and Order also declared that the ROFR was not binding on Ted and Nora Mulberry's heirs, successors, devisees, or assigns.

Defendants filed a Motion for Reconsideration on December 30, 2016.

On January 12, 2017, Plaintiffs filed a Memorandum in Opposition to Defendants' Motion for Reconsideration.

On February 24, 2017, Defendants filed a Reply in Support of Defendants' Motion for Reconsideration.

This Court heard argument on the motion for reconsideration on March 2, 2017.

II. STANDARD OF ADJUDICATION

A. Motion for Reconsideration

Rule 11.2(b)(1) states:

A motion to reconsider any order of the trial court entered before final judgment

> may be made at any time prior to or within 14 days after the entry of a final judgment. A motion to reconsider an order entered after the entry of final judgment must be made within 14 days after entry of the order.
>
> The Idaho Supreme Court has explained:
>
> The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B). On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. *See PHH Mortg. Servs. Corp. v. Perreira,* 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho,* 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)). However, a motion for reconsideration need not be supported by any new evidence or authority. When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered. In other words, if the original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration. If the original order was governed by a different standard, then that standard applies to the motion for reconsideration.

Fragnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

B. Motion for Summary Judgment

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). *See Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105; *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2002). The burden is, at all times, on the moving party to demonstrate the absence of a genuine issue of material fact. *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001).

The United States Supreme Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), stated:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which

> it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide the claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Id. at 323, 106 S.Ct. at 2553 (alterations in original).

When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. American Cleaning Services, Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). Liberal construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Madrid v. Roth*, 134 Idaho 802, 10 P.3d 751 (Ct. App. 2000).

The Idaho appellate courts have followed the United States Supreme Court's decision in *Celotex*, which stated:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." ...Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the

Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327, 106 S.Ct. at 2555 (citations omitted); *see Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002); *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002).

A party against whom a summary judgment is sought cannot merely rest on his pleadings but, when faced with affidavits or depositions supporting the motion, must come forward by way of affidavit, deposition, admissions or other documentation to establish the existence of material issues of fact, which preclude the issuance of summary judgment. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001); *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000). The non-moving party's case, however, must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2001).

The moving party is entitled to judgment when the non-moving party fails to make a sufficient showing as to the essential elements to which that party will bear the burden of proof at trial. *Primary Health Network, Inc. v. State, Dept. of Admin.*, 137 Idaho 663, 52 P.3d 307 (2002). Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018, (1998). In such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.*

> Generally, the trial court is not permitted to weigh the evidence or resolve controverted factual issues when ruling on a motion for summary judgment. *AID Ins. Co. v. Armstrong,* 119 Idaho 897, 900, 811 P.2d 507, 510 (Ct.App.1991). However, where the "evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible

> for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). *See also AID Ins. Co.,* 119 Idaho at 900, 811 P.2d at 510 (if the court will be the ultimate finder of fact, both parties have moved for summary judgment and the motions are based on the same evidentiary facts, then "summary judgment is appropriate even though conflicting inferences are possible, so long as all the evidence is confined entirely to the record"); *Blackmon v. Zufelt,* 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct.App.1985) (when the judge will be the trier of fact, he or she is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts).

Small v. State, 132 Idaho 327, 334, 971 P.2d 1151, 1158 (Ct. App. 1998); *accord Drew v. Sorensen,* 133 Idaho 534, 539, 989 P.2d 276, 281 (1999).

III. DISCUSSION

A. 6 Am. Jur. 2d *Assignments* § 40 as authority for extinguishment

Defendants argue that this Court should not have relied on 6 Am. Jur. 2d *Assignments* § 40 to conclude that a personal right of first refusal is extinguished when conveyed to another party. Defendants note that this section of the *American Jurisprudence* cites only one case in support of extinguishment, *Sniezyk v. Stocker,* 188 Misc. 2d 582, 729 N.Y.S.2d 264 (Sup 2001). In holding that a personal right of first refusal was extinguished upon its assignment, *Sniezyk* cited only one authority in support of that conclusion—*Adler v. Simpson,* 203 A.D.2d 691, 610 N.Y.S.2d 351 (3rd Dep't 1994). That case, in turn, involved the extinguishment of a right of first refusal upon the grantor's death and not upon assignment of the right. Defendants contend such authority is insufficient to find the ROFR in this case was extinguished upon its invalid assignment to Burns.

6 Am. Jur. 2d *Assignments* § 40 provides:

> The right of first refusal may be considered a personal contract, and as such, when a right of first refusal is conveyed simultaneously with a parcel, the subsequent assignment and exercise of the right of first refusal may be void as the right of first refusal does not run with the land, but rather is personal to the grantee, and thus is extinguished when the property is conveyed.[6]

[6] *Sniezyk v. Stocker,* 188 Misc. 2d 582, 729 N.Y.S.2d 264 (Sup 2001).

(Note omitted).

In *Sniezyk,* defendants Stocker and Grover conveyed a parcel of land and a right of first refusal on an adjoining parcel of land to Michele Coons, a non-party in the litigation. Coons later conveyed the property and right of first refusal to the plaintiffs in the case. Subsequent to Coons's conveyance, Stocker agreed to sell the parcel of land subject to the right of first refusal to Iaia. Stocker then gave plaintiffs notice of intent to sell. Plaintiffs notified Stocker that they desired to purchase the land under the same terms and conditions as Iaia, but Stocker then renounced his intent to sell. Plaintiffs brought an action to compel Stocker to sell the property to them. On summary judgment, the court held that the right of first refusal was personal to Coons, did not run with the land and was extinguished when Coons conveyed the property to plaintiffs. In reaching that decision, the court cited only one case, *Adler v. v. Simpson,* 203 A.D.2d 691, 610 N.Y.S.2d 351 (3rd Dep't 1994). In *Adler,* like in *Sniezyk,* the court found that the right of first refusal was personal and not binding on successors or assigns. The decision in *Adler,* however, did not hold that the right of first refusal was extinguished upon conveyance of the subject property, but rather upon the grantor's death.

This Court agrees with Defendants that the authority cited by 6 Am. Jur. 2d *Assignments* § 40, without more, is insufficient to conclude that a personal ROFR is extinguished upon its invalid assignment.

B. *Noeske v. Hiebert*

Defendants argue that a right of first refusal may be assigned with the consent of the grantor or once the right of first refusal ripens into an option. Neither scenario exists in this case. As noted by this Court in its earlier decision, nothing in the language of the ROFR indicates that the parties intended it would be assignable.

Defendants also argue that there is no authority establishing that an invalid, ineffective or void assignment extinguishes the underlying rights absent an express contractual or statutory authority requiring extinguishment. Defendants argue that the case of *Noeske v. Hiebert,* 94 Idaho 143, 483 P.2d 674 (1970), establishes that an invalid assignment does not extinguish the underlying right of first refusal.

In that case, Noeske sold numerous log-pulling machines and barges to Amos under three separate contracts. Noeske retained title on all equipment until the contracts were paid in full. The contracts also provided that Amos could not assign the property without Noeske's consent. Another party, Hiebert eventually obtained chattel mortgages on some of the equipment. In consideration of Hiebert's relinquishment of his rights under the chattel mortgages, Amos assigned Hiebert his rights under his third contract with Noeske. Noeske never granted his consent to the assignment. The Idaho Supreme Court held the assignment was void as between Noeske and Hiebert. The Court explained: "The prohibition of an assignment was for the benefit of the vendor, Noeske, however, and it in no way affected the validity of the assignment as between Amos and Hiebert, subject, of course, to Noeske's interest in enforcing the prohibition." *Id.* at 148, 483 P.2d at 679.

Defendants quote this language of the Idaho Supreme Court's decision for the proposition that an invalid assignment does not extinguish the underlying contractual rights. The Supreme Court did not, however, offer any opinion as to the effect of the invalid assignment on Amos's rights under his contract with Noeske. Applying the Court's reasoning in *Noeske* to this case indicates that Canyon Cove and Burns may enforce their contractual rights against each other under the invalid assignment, but that the assignment is invalid as to Plaintiffs. *Noeske* does not,

however, shed any light on Canyon Cove's rights against Plaintiffs as it pertains to the original ROFR.

C. Waiver

Plaintiffs argue that although the court in *Sniezyk* did not explain the rationale behind its holding that the right of first refusal was extinguished, the doctrine of waiver offers an apparent rationale. They cite *Tiffany v. City of Payette,* 121 Idaho 396, 403, 825 P.2d 493, 500 (1992), for the proposition that a voluntary and intentional relinquishment of rights constitutes waiver. Plaintiffs contend that Canyon Cove's conveyance of its interest in the ROFR to Burns was intentional and meant to relinquish its rights in the ROFR and Canyon Cove has, therefore, waived its rights under the ROFR.

Defendants reply that a party asserting waiver must have detrimentally altered its position in reliance on the waiver. Defendants cite *Brand S Corp. v. King,* 102 Idaho 731, 639 P.2d 429 (1981) and *Stoddard v. Hagadone Corp.,* 147 Idaho 186, 207 P.3d 162 (2009), in support of their argument. Defendants argue that Plaintiffs have not detrimentally relied on Canyon Cove's alleged waiver, and Plaintiffs cannot, therefore, rely on the doctrine of waiver.

Because *Sniezyk,* does not address waiver, this Court does not assume *Sniezyk* relied on the doctrine to reach its decision. However, this Court will consider Plaintiffs' waiver argument independent of *Sniezyk.*

"Waiver is a voluntary, intentional relinquishment of a known right or advantage." *Brand S Corp. v. King,* 102 Idaho 731, 734, 639 P.2d 429, 432 (1981). The Supreme Court has further explained:

> "[Waiver] is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon." *Crouch v. Bischoff,* 78 Idaho 364, 368, 304 P.2d 646, 649 (1956). "A party asserting waiver must have acted in reliance

upon the waiver and altered the party's position." *Hecla Mining Co. v. Star–Morning Mining Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992).

Stoddard v. Hagadone Corp., 147 Idaho 186, 191, 207 P.3d 162, 167 (2009).

As noted by Defendants, there is no evidence before this Court that would indicate Plaintiffs relied on any alleged waiver by Canyon Cove. Consequently, Plaintiffs cannot rely on the doctrine of waiver to establish Canyon Cove's rights under the ROFR were extinguished.

D. Appurtenant Servitudes

Plaintiffs argue that the court in *Sniezyk* may also have held the right of first refusal was extinguished because the right of first refusal constituted an appurtenant servitude. Plaintiffs contend that when a right of first refusal is personal and appurtenant to another parcel of property and the holder of the right transfers its interest in the appurtenant property, the holder of the right of first refusal loses the ability to enforce it. Plaintiffs cite Restatement (Third) of Property—Servitudes § 1.5(3) for the proposition that a servitude can be personal *and* either appurtenant or in gross.

1. The ROFR is a servitude.

Defendants argue that the ROFR cannot be a servitude because Section 1.1 of the Restatement defines a servitude as something that runs with the land. Defendants contend that because this Court held the ROFR was held personally by Canyon Cove, it cannot run with the land. They contend that the ROFR does not, therefore, fall within the scope of the Restatement.

Section 1.1 of the Restatement provides:

> (1) A servitude is a legal device that creates a right *or an obligation* that runs with land or an interest in land.
>
> (a) Running with land means that the right *or obligation* passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs.

Restatement (Third) of Property (Servitudes) § 1.1 (2000) (emphasis added). Comment d. to Section 1.1 adds: "Although both benefit and burden frequently run with land, a servitude is created if either one runs with land."

Section 1.3 explains:

> (1) A covenant is a servitude if either the benefit *or the burden* runs with land. A covenant that is a servitude "runs with land."

Restatement (Third) of Property (Servitudes) § 1.3 (2000). Comment a. to Section 1.3 clarifies:

> These terms indicate only that some part of the covenant runs with some interest in land. They do not necessarily mean that both burden and benefit run, nor do they mean that the burden or benefit will run with all estates in the land or to all successors.

Section 1.5 defines the following terms:

> (1) "Appurtenant" means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land. The right to enjoyment of an easement or profit, or to receive the performance of a covenant that can be held only by the owner or occupier of a particular unit or parcel, is an appurtenant benefit. A burden that obligates the owner or occupier of a particular unit or parcel in that person's capacity as owner or occupier is an appurtenant burden.
>
> (2) "In gross" means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.
>
> (3) "Personal" means that a servitude benefit or burden is not transferable and does not run with land. *Whether appurtenant or in gross, a servitude benefit or burden may be personal.*

Restatement (Third) of Property (Servitudes) § 1.5 (2000) (emphasis added). Comment a further clarifies:

> Relation between appurtenant, running with land, and personal. Only appurtenant benefits and burdens run with land, but the terms are not synonymous. Running with land means that the benefit or burden passes automatically to successors; *appurtenant means that the benefit can be used only in conjunction with ownership or occupancy of a particular parcel of land,* or that only the owner or occupier of a particular parcel is liable for failure to perform a servitude obligation. *Appurtenant benefits and burdens ordinarily run with land, but they may be made personal to particular owners or occupiers of the land.*

(Emphasis added).

Section 3.3 of the Restatement provides that the rule against perpetuities does not act to invalidate servitudes. Comment a., to section 3.3 indicates that rights of first refusal may be contemplated as servitudes. It states: "The rule stated in this section applies to options and rights of first refusal with respect to the purchase of land, as well as to other servitudes, and to powers to create servitudes in the future." Restatement (Third) of Property (Servitudes) § 3.3 (2000).

As discussed in this Court's prior decision, the burden placed on Plaintiffs' property runs with the land. Just as Mulberrys were obligated by the ROFR's burden, so too would TN Properties be obligated to honor the ROFR, assuming for the sake of argument that the ROFR had not been extinguished. Consequently, Defendants argument that the ROFR cannot be a servitude because it does not run with the land is without merit.

2. The Restatement (Third) of Property—Servitudes constitutes pertinent, persuasive authority in this case.

Defendants argue that none of the Restatement sections relied on by Plaintiffs have been adopted by the Idaho appellate courts and should not, therefore, be applied. Defendants argue that it is improper to rely on the Restatement where the issue can be resolved with current Idaho law and when the Restatement is inconsistent with Idaho precedent. Defendants state that there is no Idaho case law indicating when a right of first refusal is appurtenant or in gross, but asks this Court to consider Idaho case law pertaining to easement designations and extend that precedent, by analogy, to rights of first refusal.

In *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass'n, Inc.*, 152 Idaho 338, 345, 271 P.3d 1194, 1201 (2012), the trial court granted summary judgment in favor of plaintiff on the basis of Idaho's common law principal of dedication. On appeal, the defendant HOA argued

that the trial court should have applied Section 6.19 of the Restatement (Third) of Property—Servitudes, rather than the common law rule of dedication. The Idaho Supreme Court affirmed the trial court, explaining:

> The Restatement is not law unless it has been adopted by this Court." *Estate of Skvorak v. Sec. Union Title Ins. Co.,* 140 Idaho 16, 22, 89 P.3d 856, 862 (2004). "This Court will not adopt a Restatement provision if it is inconsistent with Idaho precedent, a different formulation resolved the issue, or the issue can be resolved by current Idaho law." *Id.* Since the common law doctrine of dedication exists in Idaho and provides a means by which to resolve the parties' ownership dispute, we hold that the district court was not obligated to apply the Restatement. The HOA's dissatisfaction with the burdens imposed upon a party asserting common law dedication is not a sufficient basis for this Court to adopt a doctrine not previously recognized in Idaho when existing Idaho law resolves the matter. We therefore affirm the district court.

Id. at 345, 271 P.3d at 1201 (note omitted).

Unlike in *Asbury Park,* existing Idaho law pertaining to rights of first refusal does not conflict with the Restatement. In fact, as noted by Defendants, Idaho law does not give guidance on when a right of first refusal is considered appurtenant or in gross. This Court, therefore, looks to the Restatement, case law in other jurisdictions, and Idaho easement law as guidance in deciding this matter.

3. The ROFR is appurtenant to the Purchased Property.

Plaintiffs argue that the ROFR is appurtenant to the Purchased Property. They cite *Nature Conservancy of Wisconsin, Inc. v. Altnau,* 313 Wis.2d 382, 756 N.W.2d 641 (Ct. App. Wis. 2008), which relied on sections 4.1 and 4.5 of the Restatement, for guidance in determining whether a right of first refusal is appurtenant or in gross.

Defendants reply that *Nature Conservancy,* is distinguishable from this case because the right of first refusal in that case ran with the land and was not personal. Defendants urge this Court to look to Idaho case law pertaining to appurtenant easements. In particular, Defendants

cite to *Hoch v. Vance*, 155 Idaho 636, 639–40, 315 P.3d 824, 827–28 (2013), for the proposition that in order for an easement to be appurtenant, it (and a right of first refusal, by analogy) must directly benefit the owner of the appurtenant property in such a way that the benefit cannot be separated from the owner's rights in the appurtenant property. Defendants argue that use of the ROFR Property does not directly benefit the Purchased Property because the properties are not contiguous and do not share any common easements, restrictions, ingress or egress. Defendants contend that the ROFR cannot, therefore, be appurtenant to the Purchased Property.

As previously discussed, the ROFR in this case runs with the land and is a servitude. Therefore, Defendants' efforts to distinguish *Nature Conservancy* on the basis that the ROFR is not a servitude is without merit.

Section 4.1(1) of the Restatement states:

> A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

Restatement (Third) of Property (Servitudes) § 4.1 (2000).

Section 4.5 states:

> (1) Except where application of the rules stated in § 4.1 leads to a different result, the benefit of a servitude is:
>
> (a) appurtenant to an interest in property if it serves a purpose that would be more useful to a successor to a property interest held by the original beneficiary of the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of that interest to a successor;
>
> (b) in gross if created in a person who held no property that benefited from the servitude, or if it serves a purpose that would be more useful to the original beneficiary than it would be to a successor to an interest in property held by the original beneficiary at the time the servitude was created;
>
> (c) personal if not transferable under the rule stated in § 4.6(2).

(2) *In cases of doubt, a benefit should be construed to be appurtenant rather than in gross.*

Restatement (Third) of Property (Servitudes) § 4.5 (2000) (emphasis added).

In *Nature Conservancy,* the Wisconsin Court of Appeals addressed the issue of whether a right of first refusal, which was clearly assignable under its terms, was an in gross servitude and could be assigned to anybody or whether it was an appurtenant servitude and had to be assigned together with one of three properties adjoining the subject property. The court relied on contract interpretation and the Restatement to determine whether the right of first refusal was appurtenant or in gross. The court explained:

> [T]he issue in this case is not *whether* the right may be assigned, but *how* it may be assigned. It is no contradiction to say that the right of first refusal is assignable, and also to say that it runs with the land. If the right is appurtenant, and bundled with the three parcels sold in the 1967 agreement, it may still be assigned; it simply must be assigned along with one of the parcels.
> . . .
>
> [T]he ultimate goal in construing this agreement, as in construing other contracts, is to determine by the words of the contract what the contracting parties intended.
> . . .
>
> We . . . conclude that the 1967 agreement contains no clear and unambiguous statement that the right of first refusal is either in gross or appurtenant to the transferred parcels. We also note that our research into Wisconsin case law has not turned up any particular rules or test to guide us in determining whether an ambiguous writing creates an in gross or appurtenant servitude. However, the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000) does provide a test. Both parties have argued according to the RESTATEMENT (THIRD) approach, and we find the rules it sets forth reasonable and helpful. We therefore adopt them here.
>
> The overarching principle for the interpretation of servitudes is given in § 4.1: "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Id.* § 4.1. Section 4.5 contains more specific rules for determining whether a servitude benefit is appurtenant or in gross. . . .
>
> . . .

> So, the RESTATEMENT (THIRD) system is this: we first look to the language of the instrument, the circumstances surrounding the creation of the servitude, and the purpose for which it was created. Of course, this first step roughly comports with what Wisconsin courts do with all written agreements. But if the language and surrounding circumstances (and any extrinsic evidence) fail to yield a clear answer as to whether a servitude's benefit is in gross or appurtenant, the RESTATEMENT (THIRD) provides a way of resolving the question: we ask whether the benefit would be of more use to someone holding the property interest held by the original beneficiary of the servitude, or, instead, of more use to that original beneficiary than to someone else holding the original beneficiary's property interest. Where this inquiry does not yield a clear answer, we construe the benefit as appurtenant.

Id. at 390-94; 756 N.W.2d at ___ (note omitted).

In *Hoch,* the Idaho Supreme Court explained:

> There are two general types of easements: easements appurtenant and easements in gross. *Hodgins v. Sales,* 139 Idaho 225, 230, 76 P.3d 969, 974 (2003). This Court has explained the difference between these two types of easements as follows:
>
> > An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate. Essentially, an easement appurtenant serves the owner of the dominant estate in a way that cannot be separated from his rights in the land. When an appurtenant easement is created, it becomes fixed as an appurtenance to the real property, which is subject to the prescriptive use and may be claimed by a successor in interest. In contrast, an easement in gross benefits the holder of the easement personally, without connection to the ownership or use of a specific parcel of land. Thus, easements in gross do not attach to property. In cases of doubt, Idaho courts presume the easement is appurtenant.
>
> *Id.* (internal citations omitted).
>
> At the time Cridlebaugh reserved an easement over the upper road to the Hoch property, he was the owner of the Hoch property. The easement gave him access to his property. Thus, the easement's benefit to Cridlebaugh was directly connected to his ownership or use of what is now the Hoch property. The district court did not err in holding that this easement was an appurtenant easement.

Hoch v. Vance, 155 Idaho 636, 639–40, 315 P.3d 824, 827–28 (2013). "[I]n case of doubt, the weight of authority holds that the easement should be presumed appurtenant." *Joyce Livestock Co. v. United States*, 144 Idaho 1, 12–13, 156 P.3d 502, 513–14 (2007) (emphasis added).

In this case, the creating document is silent as to whether the ROFR was intended to be appurtenant or in gross. Idaho law provides:

> Where the language of a written agreement is clear and unambiguous, the trial court will give effect to the language employed according to its ordinary meaning, *J. R. Simplot Co. v. Chambers,* 82 Idaho 104, 350 P.2d 211 (1960); *Durant v. Snyder,* 65 Idaho 678, 151 P.2d 776 (1944), determination of its meaning and legal effect being a question of law. *Beal v. Mars Larson Ranch Corp., Inc.,* 99 Idaho 662, 586 P.2d 1378 (1978); *Parks v. City of Pocatello,* 91 Idaho 241, 419 P.2d 683 (1966).
>
> But when the terms of a written contract are ambiguous, its interpretation and meaning become a question of fact and extrinsic evidence may be considered by the trier of fact in an attempt to arrive at the true intent of the contracting parties. *Roberts v. Hollandsworth,* 582 F.2d 496 (9th Cir. 1978); *Bergkamp v. Carrico,* 101 Idaho 365, 613 P.2d 376 (1980); *Puchner v. Allatt,* 101 Idaho 37, 607 P.2d 1091 (1980); *Werry v. Phillips Petroleum Co.,* 97 Idaho 130, 540 P.2d 792 (1975); *Rudeen v. Howell,* 76 Idaho 365, 283 P.2d 587 (1955).
>
> In so doing the trier of fact may consider the objective and purpose of the particular provision and may also scrutinize the circumstances surrounding formation of the contract. Id.

Int'l Eng'g Co. v. Daum Indus., Inc., 102 Idaho 363, 365, 630 P.2d 155, 157 (1981).

Because the ROFR does not clearly indicate whether the parties intended the right to be appurtenant to the Purchased Property or in gross, the ROFR is ambiguous as to that issue.[1] Consequently, this Court resorts to extrinsic evidence to determine the intent of the parties. The facts relating to the execution of the ROFR are not in dispute. The ROFR was executed simultaneously with the March 18, 1999, Addendum to the PSA at the time of closing on the Purchased Property. When Canyon Cove conveyed its interest in the Purchased Property to Burns, it simultaneously conveyed its interest in the ROFR. Both of these facts, while not conclusive, support an inference that the parties viewed the ROFR as being appurtenant to the

[1] This Court notes that in its November 10, 2016, Memorandum Decision and Order Re: Motion for Partial Summary Judgment, it held that the language of the ROFR was plain and unambiguous, as pertaining to the question of whether the ROFR was assignable. For the reasons discussed in that decision, a finding of ambiguity on the question of appurtenance does not disturb this Court's previous determination that the ROFR was unambiguous as to the question of assignability.

Purchased Property. It also supports an inference that the ROFR was intended to benefit the Purchased Property. *See Hoch, supra,* ("An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate.").

Looking at the Restatement of Property—Servitudes reinforces a finding that the ROFR was appurtenant to the Purchased Property. Though the properties are not contiguous, the proximity between the Purchased Property and the ROFR Property, makes the use of the ROFR Property arguably more useful to the owner of the Purchased Property than to an independent party who does not own nearby property. While there may be room for doubt as to whether Canyon Cove or Burns might retain greater use of the ROFR Property after Canyon Cove's conveyance of the Purchased Property to Burns, such doubt is resolved in favor of construing the ROFR as being appurtenant. *See* Rest. (Third) of Property—Servitudes § 4.5(2); *Joyce Livestock, supra.*

4. Canyon Cove's Rights after Transfer of the Purchased Property

Plaintiffs contend that as a result of the ROFR being appurtenant to the Purchased Property, Canyon Cove's sale of the Purchased Property to Burns extinguished Canyon Cove's ability to enforce the ROFR. Plaintiffs cite Section 8.1 of the Restatement in support of their position.

Because 'appurtenant' is defined as allowing a benefit to be "used only in conjunction with ownership or occupancy of a particular parcel of land," Restatement (Third) of Property—Servitudes § 1.5, Canyon Cove could not assert the benefit of the ROFR once it divested itself of the Purchased Property. Furthermore, Section 8.1 of the Restatement explains:

> A person who holds the benefit of a servitude under any provision of this Restatement has a legal right to enforce the servitude. Ownership of land intended to benefit from enforcement of the servitude is not a prerequisite to enforcement,

> but a person who holds the benefit of a covenant in gross must establish a legitimate interest in enforcing the covenant.

Restatement (Third) of Property (Servitudes) § 8.1 (2000). Comment a. to Section 8.1 goes on to explain that ownership of land has not been required to enforce servitudes because American courts have refused to follow English common law which disallowed the creation of servitudes with benefits in gross. This rule and explanation, however, presupposes that a party seeking to enforce a servitude without any ownership of land holds the servitude in gross. In this case, Canyon Cove held an appurtenant ROFR and not a ROFR in gross.

Because Canyon Cove no longer has an interest in the Purchased Property, and Canyon Cove's interest in the ROFR was appurtenant to the Purchased Property and not held in gross, Canyon Cove's rights under the ROFR have been extinguished.

IV. CONCLUSION AND ORDER

Defendants' motion for reconsideration is denied.

IT IS SO ORDERED.

DATED this 20 day of Mar 2017.

DANE H. WATKINS, JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of March 2017, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

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Idaho Falls, ID 83402

Robert B. Burns
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702

PENNY MANNING
Clerk of the District Court
Bonneville County, Idaho

By CMC
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs, vs. BURNS CONCRETE INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-16-3413 ORDER DISMISSING PLAINTIFFS' REMAINING CLAIMS AS MOOT

Plaintiffs, having moved this Court to dismiss their remaining claims as moot, and good cause appearing:

IT IS ORDERED that Plaintiffs' remaining claims are dismissed as moot and this action is DISMISSED, WITH PREJUDICE.

DATED this 27 day April, 17.

By _____
Honorable Dane H. Watkins

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of April, 17, I served a true and correct copy of the foregoing ORDER DISMISSING PLAINTIFFS' REMAINING CLAIMS AS MOOT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Robert B. Burns PARSONS BEHLE & LATIMER 800 W. Main Street, Suite 1300 Boise, Idaho 83702 Telephone (208) 562-4900 *Attorneys for Defendants*	[✓] [ ] [ ] [ ]	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile (208) 562-4901
Donald F. Carey Dina L. Sallak CAREY PERKINS LLP 980 Pier View Drive, Suite B P. O. Box 51388 Idaho Falls, Idaho 83402-4918 Telephone: (208) 529-0000 *Attorneys for Plaintiffs*	[✓] [ ] [ ] [ ]	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile (208) 529-0005

CMC
Clerk of the Court

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs, vs. BURNS CONCRETE INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-16-3413 JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS: all pending matters in the above entitled case are hereby dismissed, with prejudice.

DATED this 27 day April, 17.

By_____
Honorable Dane H. Watkins

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of April, 17, I served a true and correct copy of the foregoing JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs/Respondents, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants/Appellants.	Case No. CV-16-3413 **NOTICE OF APPEAL**

TO THE ABOVE NAMED RESPONDENTS, NORA A. MULBERRY AND TN PROPERTIES LLC, AND THEIR ATTORNEYS:

Donald F. Carey
Dina L. Sallak
Lindsey R. Romankiw
Carey Perkins LLP
980 Pier View Drive, Suite B
P.O. Box 51388
Idaho Falls, ID 83402-4918

AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Burns Concrete, Inc. and Canyon Cove Development Company, LLP, appeal against the above named respondents to the Idaho Supreme Court from the Judgment entered in the above entitled action on the 27th day of April 2017, the Honorable Dane H. Watkins, Jr., presiding.

2. The appellants have a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph 1 above is appealable under and pursuant to Rule 11(a)(1), I.A.R.

3. The appellants' preliminary statement of the issues on appeal is as follows:

a. Did the district court err in ruling that the right of first refusal at issue (the "ROFR") could not be assigned by the designated beneficiary Canyon Cove Development Company, LLP ("Canyon Cove") to Burns Concrete Inc. ("Burns Concrete")?

b. Did the district court err in ruling that all of the rights of Canyon Cove under the ROFR were extinguished upon Canyon Cove's purported assignment of the ROFR to Burns Concrete?

4. No order has been entered sealing all or any portion of the record.

5. No reporter's transcript is requested.

6. The appellants request the following documents to be included in the clerk's record, together with any additional documents automatically included under Rule 28(b)(1), I.A.R.:

a. Verified Complaint for Declaratory Judgment, filed June 29, 2016;

b. Answer, filed July 22, 2016;

c. Affidavit of Kirk Burns, filed September 8, 2016;

d. Affidavit of Linda Wilkins, filed September 8, 2016;

e. Memorandum Decision and Order Re: Motion for Partial Summary Judgment, filed November 10, 2016;

f. Second Affidavit of Kirk Burns, filed February 15, 2017;

g. Memorandum Decision and Order Re: Motion for Reconsideration, filed March 20, 2017;

h. Order Dismissing Plaintiffs' Remaining Claims as Moot, filed April 27, 2017;

i. Judgment, filed April 27, 2017; and

j. This Notice of Appeal.

7. N/A.

8. I certify:

a. N/A.

b. N/A.

c. That the estimated fee of $100.00 for preparation of the clerk's record has been paid.

d. That the appellate filing fee in the amount of $129.00 has been paid.

e. That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 2nd day of June 2017.

PARSONS BEHLE & LATIMER

By _____
Robert B. Burns
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June 2017, a true and correct copy of the within and foregoing instrument was served upon:

Donald F. Carey
Dina L. Sallak
Lindsey R. Romankiw
Carey Perkins LLP
980 Pier View Drive, Suite B
P.O. Box 51388
Idaho Falls, Idaho 83402-4918

- ☐ U.S. Mail
- ☒ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Delivery
- ☐ Email:

Robert B. Burns

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

2017 JUL 27 PM 1:25

DISTRICT COURT
7TH JUDICIAL DISTRICT
BONNEVILLE COUNTY ID

NORA A. MULBERRY and TN PROPERTIES, LLC, Plaintiffs, vs. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants.	Case No. CV-2016-3413 **MEMORANDUM DECISION AND ORDER RE: ATTORNEY FEES AND COSTS**

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a Verified Complaint for Declaratory Judgment on June 29, 2016, asking this Court to determine whether an Undivided Right of First Refusal (ROFR) between it and Canyon Cove was void or non-binding. Plaintiffs filed a Motion for Partial Summary Judgment on August 22, 2016.

On November 10, 2016, this Court entered a Memorandum Decision and Order declaring that the ROFR was personal to the Mulberrys and Canyon Cove and that the ROFR was extinguished when Canyon Cove assigned it to Burns. The Memorandum Decision and Order also declared that the ROFR was not binding on the Mulberrys' heirs, successors, devisees, or assigns, as a result of the extinguishment.

Defendants filed a Motion for Reconsideration on December 30, 2016.

On March 20, 2017, this Court entered a Memorandum Decision and Order denying Defendants' Motion for Reconsideration.

On April 25, 2017, Plaintiffs filed a Motion to Dismiss for Mootness of Remaining Claims, which this Court granted.

Judgment was entered on April 27, 2017, dismissing all pending matters with prejudice.

On May 4, 2017, the parties submitted a Stipulation Extending Time for Defendants' Response to Plaintiffs' Memorandum of Costs.

On May 10, 2017, Plaintiffs filed a Motion for Costs and Attorney's Fee and a Memorandum of Costs.

On June 6, 2017, Defendants filed a Motion of Defendants to Disallow Costs and Attorney Fees.

On June 14, 2017, Defendants filed a Notice of Appeal.

Defendants filed a Memorandum in Support of Motion of Defendants to Disallow Costs and Attorney Fees on June 30, 2017.

Plaintiffs filed a Reply in Support of Motion for Costs and Attorney's Fees and Motion to Strike Defendants' Memorandum in Support of Motion to Disallow Costs and Attorneys Fees.

II. STANDARD OF ADJUDICATION

The decision whether to award attorney fees is left to the discretion of the district court. *Berkshire Investments, LLC v. Taylor,* 153 Idaho 73, 80, 278 P.3d 943, 950 (2012); *Bennett v. Patrick,* 152 Idaho 854, 856, 276 P.3d 726, 728 (2012).

III. DISCUSSION

Plaintiffs seek attorney fees and costs, totaling $ 11,933.50, under I.R.C.P. 54(d)(1)(C) and Idaho Code §§ 10-1210, 12-120(3) and 12-121.

A. Timeliness of Motion to Disallow

Plaintiffs argue that pursuant to the parties' stipulation, Defendants had up until June 6, 2017, to file objections to Plaintiffs' motion for fees and costs. Plaintiffs argue that because

Defendants' memorandum in support of their motion to disallow fees was filed after June 6, 2017, it is untimely and should be struck.

I.R.C.P. 54(d)(5) states:

> Within 14 days of service of a memorandum of costs, any party may object by filing and serving a motion to disallow part or all of the costs. *The motion . . . must be heard and determined by the court as other motions under these rules.* Failure to timely object to the items in the memorandum of costs constitutes a waiver of all objections to the costs claimed.

(Emphasis added).

I.R.C.P. 7(b)(3) provides:

> (A) A written motion, affidavit(s) supporting the motion, memoranda or briefs supporting the motion, if any, . . . must be filed with the court and served so as to be received by the parties at least 14 days prior to the day designated for hearing.
>
> . . .
>
> (D) The moving party must indicate on the face of the motion whether oral argument is desired. *If a brief or memorandum is not filed with the motion, the motion must indicate on the face of the motion whether the party intends to file a brief or memorandum supporting the motion.*

(Emphasis added).

As noted by Plaintiffs, the parties agreed by stipulation that Defendants would have until June 6, 2017, "to file objections to any memorandum of costs and attorney fees Plaintiffs may file with the Court." Defendants' motion to disallow fees and costs was filed on June 6, 2017. Defendants' motion was timely under the terms of the stipulation. Defendants' memorandum in support of the motion to disallow was filed on June 30, 2017, twenty days prior to the July 20, 2017, hearing date for the motion. Defendants filed the memorandum in compliance with the time requirements set forth in the stipulation, I.R.C.P. 7(b)(3), and I.R.C.P. 54(d)(5).

B. Prevailing Party

Defendants argue that Plaintiffs are not the prevailing party in this case under I.R.C.P. 54(d)(1)(B) and should not be awarded attorney fees. Defendants argue that Plaintiffs' complaint sought relief on three bases, under which this Court did not grant relief. They add that because the Judgment dismissed the case with prejudice, Defendants could not have received a more favorable outcome and are, therefore, the prevailing party. Defendants cite *Sanders v. Lankford,* 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000), in support of their argument.

"The determination of who is a prevailing party is committed to the sound discretion of the trial court, and we will not disturb that determination absent an abuse of discretion." *Bream v. Benscoter,* 139 Idaho 364, 368, 79 P.3d 723, 727 (2003).

In *Sanders,* Joan Sanders ran a temporary employment service. David Lankford, president and principal shareholder of Northwestern Parts Washer, Inc., signed a contract with Sanders, on behalf of Northwestern. After Northwestern failed to make payment on the contract, Sanders filed a complaint against Lankford seeking payments owed. Soon after Sanders filed the complaint, Lankford paid the amount owed and moved to dismiss Sanders's complaint. The magistrate granted Lankford's motion to dismiss on the ground that by naming Lankford instead of Northwestern, Sanders had failed to name and serve the proper party. Lankford then filed a motion for fees. The magistrate denied Lankford's motion, stating that Lankford was not the prevailing party because the lawsuit had been brought as a result of Lankford's reticence to pay his debt. The district court affirmed the magistrate court and Lankford appealed to the Court of Appeals.

On appeal, the Court of Appeals held that the magistrate's determination was inconsistent with the Rule 54(d)(1)(B) prevailing party analysis. The Court stated:

> On the prevailing party issue, governing legal standards are provided by Idaho Rule of Civil Procedure 54(d)(1)(B), which states:
>
> > In determining which party to an action is a prevailing party and entitled to costs, *the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties*, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.
>
> Thus, under I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Chadderdon,* 104 Idaho at 411, 659 P.2d at 165. The result obtained may be the product of a court judgment or of a settlement reached by the parties. *Jerry J. Joseph C.L.U. Assoc.,* 117 Idaho at 557, 789 P.2d at 1148; *Ladd v. Coats,* 105 Idaho 250, 254, 668 P.2d 126, 130 (Ct.App.1983).
>
> In our view, the magistrate did not properly apply the criteria of Rule 54(d)(1)(B) in holding that Lankford was not the prevailing party. The magistrate's determination that Sanders failed to name the proper defendant and the dismissal of Sanders' complaint are not challenged on appeal. Sanders improperly named Lankford, individually, rather than the corporation, Northwestern Parts Washer, Inc., as the defendant. The magistrate recognized the distinction between the corporate entity responsible for the debt and the party sued on the debt, Lankford, in its dismissal order. The result obtained in this case was a dismissal of Sanders' action-the most favorable outcome that could possibly be achieved by Lankford as defendant. There were not multiple claims or issues, but a single claim by Sanders for collection of an account receivable, on which Lankford was successful.
>
> Although the prevailing party determination is discretionary in nature, this discretion must be exercised within the bounds of governing legal standards. Under some circumstances application of these standards requires a holding that one party is the prevailing party on a particular claim as a matter of law. *Holmes*

> *v. Holmes,* 125 Idaho 784, 788, 874 P.2d 595, 599 (Ct.App.1994). This is such a case, for application of the Rule 54(d)(1)(B) factors can lead only to a conclusion that Lankford was the prevailing party.

Sanders v. Lankford, 134 Idaho at 325-26, 1 P.3d at 826-27 (Ct. App. 2000) (emphasis added).

The facts in *Sanders* are distinguishable from those in this case. In *Sanders,* the plaintiff did not receive any relief through the lawsuit. Although Sanders recovered from Lankford, the recovery occurred extrajudicially. In the judicial proceedings, Sanders complaint was dismissed as a result of her not naming or serving the proper party.

In this case, Plaintiffs brought an action for declaratory judgment, seeking the following relief:

> 1. Finding that the Undivided Right of First Refusal is void or voidable for failure of consideration;
>
> 2. Finding that the Undivided Right of First Refusal to Acquire Interest in Real Property is void based on equity given the unconscionable manner of its presentation;
>
> 3. Finding that if not void based on failure of consideration or based on equity, that its affect is limited to sales of the subject property, and is in no way binding on inter vivos gift transfers or intestate succession owners of the affected property;
>
> . . .
>
> 5. *For other and further relief as the Court deems appropriate* under the circumstances.

Verified Complaint at 4.

In their motion for summary judgment, Plaintiffs sought a declaration that the ROFR was personal to the parties; not binding on Mulberrys' heirs, successors, devisees, or assigns; and non-beneficial to Burns. This Court granted summary judgment to the Plaintiffs, holding that the ROFR was extinguished when Canyon Cove assigned it to Burns. This Court also held that the

ROFR was not binding on Mulberrys' heirs, successors, devisees, or assigns. Following this Court's denial of Defendants' motion for reconsideration, Plaintiffs filed a Motion to Dismiss for Mootness of Remaining Claims, which this Court granted. This Court then entered Judgment, dismissing "all pending matters in the above entitled case."

Paragraph 5 in Plaintiffs' Prayer for Relief requested: "For other and further relief as the Court deems appropriate under the circumstances." Verified Complaint at 4. This Court's declaration that the ROFR was extinguished and non-binding was in accordance with the relief sought by Plaintiffs. Although Plaintiffs' complaint was, upon Plaintiffs' motion, thereafter dismissed as moot, Defendants cannot be said to have prevailed in the matter. Plaintiffs, ultimately received the result they sought—a determination that the ROFR was not assignable. Defendants argue that they could not have obtained a more favorable outcome than the dismissal of Plaintiffs' complaint. Defendants overlook, however, that a more favorable outcome would have involved a declaration that the ROFR was assignable by Canyon Cove and binding on the Mulberrys, their successors, devisees and assigns. The fact that Defendants now appeal that determination indicates Defendants did not achieve the outcome they desired. Plaintiffs are the prevailing party in this matter.

C. Idaho Code § 10-1210

"In any proceeding under this act the court may make such award of costs as may seem equitable and just." I.C. § 10-1210. "Idaho Code § 10–1210 does not provide authority to award attorney fees in a declaratory action. In *Freiburger* we held that other statutory provisions were available in a declaratory action for an award of attorney fees." *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 141 Idaho 537, 542–43, 112 P.3d 825, 830–31 (2005) (*citing Freiburger v. J–U–B Engineers, Inc.*, Docket No. 30104, WL 674207 (March 24, 2005)).

Although Plaintiffs are entitled to recover costs under Idaho Code § 10-1210, that statute does not authorize the collection of attorney fees.

D. Idaho Code § 12-120(3)

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-120(3).

The parties agree that this case revolves around a commercial transaction. Plaintiffs, as the prevailing party, are entitled to attorney fees under Idaho Code § 12-120(3).

E. Idaho Code § 12-121

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-121.

This Court cannot conclude that Defendants defended this case frivolously, unreasonably or without foundation. Therefore, Plaintiffs are not entitled to attorney fees under Idaho Code § 12-121.

F. Amount of Fees

> If the court grants attorney fees to a party or parties in a civil action it must consider the following in determining the amount of such fees:
>
> (A) the time and labor required;

(B) the novelty and difficulty of the questions;

(C) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;

(D) the prevailing charges for like work;

(E) whether the fee is fixed or contingent;

(F) the time limitations imposed by the client or the circumstances of the case;

(G) the amount involved and the results obtained;

(H) the undesirability of the case;

(I) the nature and length of the professional relationship with the client;

(J) awards in similar cases;

(K) the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case;

(L) any other factor which the court deems appropriate in the particular case.

I.R.C.P. 54(e)(3).

The Idaho Supreme Court has explained:

"[T]he law is clearly settled that when awarding attorney fees in a civil action, the district court must consider the I.R.C.P. 54(e)(3) factors, but need not make specific written findings on the various factors." *Lee v. Nickerson,* 146 Idaho 5, 11, 189 P.3d 467, 473 (2008) (citations omitted). This rule is based upon the text of Rule 54(e)(3), which sets forth the factors that "the trial court 'shall *consider* ... in determining the amount of such fees.' (Emphasis added.)" *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988) (quoting I.R.C.P. 54(e)(3)), *overruled on other grounds by Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho 589, 130 P.3d 1127 (2006). The plain language of the Rule "does not require written findings on each factor," and the court's "failure to specifically address each separate factor does not, by itself constitute a 'clear manifest abuse of discretion.' " *Id.* Thus, in the context of the district court's determination of the amount of fees, the absence of written findings does not, *per se,* demonstrate an abuse of discretion.

Poole v. Davis, 288 P.3d 821, 824 (2012).

Considering all of the I.R.C.P. 54(e)(3) factors, this Court finds an award of $11,447.50 in attorney fees to be reasonable.

G. Costs as a Matter of Right

Plaintiffs request $266.00 in costs as a matter of right. This total is comprised of $221.00 in filing fees and $45.00 in service fees.

I.R.C.P. 54(d)(1)(C) provides:

> Costs as a Matter of Right. When costs are awarded to a party, that party is entitled to the following costs, actually paid, as a matter of right:
>
> (i) court filing fees;
>
> (ii) actual fees for service of any pleading or document in the action, whether served by a public officer or other person;

I.R.C.P. 54.

I.R.C.P. 54(d)(1)(C)(i) authorizes the $221.00 for Plaintiffs' filing fees. I.R.C.P. 54(d)(1)(C)(i) authorizes the $45.00 for Plaintiffs' service fees.

Plaintiffs should be awarded $266.00 in costs as a matter of right.

IV. CONCLUSION AND ORDER

This Court awards to Plaintiffs $11,447.50 in attorney fees and $226.00 in costs as a matter of right.

IT IS SO ORDERED.

DATED this 26 day of July 2017.

DANE H. WATKINS, JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of July 2017, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Dina L. Sallak
CAREY PERKINS, LLP
P.O. Box 51388
Idaho Falls, ID 83402

Robert B. Burns
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702

PENNY MANNING
Clerk of the District Court
Bonneville County, Idaho

By A. Barney
Deputy Clerk

TRANSACTION REPORT

JUL/27/2017/THU 04:36 PM

BROADCAST

#	DATE	START T.	RECEIVER	COM.TIME	PAGE	TYPE/NOTE	FILE
001	JUL/27	04:29PM	95290005	0:02:06	12	MEMORY OK SG3	9184
002		04:31PM	95624901	0:04:39	12	MEMORY OK G3	9184
TOTAL				0:06:45	24		

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

2017 JUL 27 PM 1:25

NORA A. MULBERRY and TNT PROPERTIES, LLC,

Plaintiffs,

vs.

BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP,

Defendants.

Case No. CV-2016-3413

MEMORANDUM DECISION AND ORDER RE: ATTORNEY FEES AND COSTS

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a Verified Complaint for Declaratory Judgment on June 29, 2016, asking this Court to determine whether an Undivided Right of First Refusal (ROFR) between it and Canyon Cove was void or non-binding. Plaintiffs filed a Motion for Partial Summary Judgment on August 22, 2016.

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Defendants filed a Motion for Reconsideration on December 30, 2016.

On March 20, 2017, this Court entered a Memorandum Decision and Order denying

Robert B. Burns, ISB No. 3744
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702
Telephone: (208) 562-4900
Facsimile: (208) 562-4901
Email: rburns@parsonsbehle.com

Attorneys for Defendants/Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiffs/Respondents, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLP, Defendants/Appellants.	Case No. CV-16-3413 **AMENDED NOTICE OF APPEAL**

TO THE ABOVE NAMED RESPONDENTS, NORA A. MULBERRY AND TN PROPERTIES LLC, AND THEIR ATTORNEYS:

Donald F. Carey
Dina L. Sallak-Windes
Lindsey R. Romankiw
Carey Perkins LLP
980 Pier View Drive, Suite B
P.O. Box 51388
Idaho Falls, ID 83402-4918

AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Burns Concrete, Inc. and Canyon Cove Development Company, LLP, appeal against the above named respondents to the Idaho Supreme Court from the final Judgment entered in the above entitled action on the 27th day of April 2017, the Honorable Dane H. Watkins, Jr., presiding. A copy of the Judgment being appealed is attached to this notice, together with a copy of the order subject to this appeal entered after said Judgment.

2. The appellants have a right to appeal to the Idaho Supreme Court, and the Judgment and post-Judgment order described in paragraph 1 above are appealable under and pursuant to I.A.R. 11(a)(1) and (7).

3. The appellants' preliminary statement of the issues on appeal is as follows:

a. Did the Judgment effect the dismissal, with prejudice, of all of the respondent's claims against the appellants?

b. Did the district court err in ruling that the right of first refusal at issue (the "ROFR") could not be assigned by the designated beneficiary Canyon Cove Development Company, LLP ("Canyon Cove") to Burns Concrete Inc. ("Burns Concrete")?

c. Did the district court err in ruling that all of the rights of Canyon Cove under the ROFR were extinguished upon Canyon Cove's purported assignment of the ROFR to Burns Concrete?

d. Did the district court err in ruling that the respondents were the prevailing parties in this litigation notwithstanding the dismissal, with prejudice, of all of their claims against the appellants.

4. No order has been entered sealing all or any portion of the record.

5. No reporter's transcript is requested.

6. The appellants request the following documents to be included in the clerk's record, together with any additional documents automatically included under I.A.R. 28(b)(1):

a. Verified Complaint for Declaratory Judgment, filed June 29, 2016;

b. Answer, filed July 22, 2016;

c. Affidavit of Kirk Burns, filed September 8, 2016;

d. Affidavit of Linda Wilkins, filed September 8, 2016;

e. Memorandum Decision and Order Re: Motion for Partial Summary Judgment, filed November 10, 2016;

f. Second Affidavit of Kirk Burns, filed February 15, 2017;

g. Memorandum Decision and Order Re: Motion for Reconsideration, filed March 20, 2017;

h. Order Dismissing Plaintiffs' Remaining Claims as Moot, filed April 27, 2017;

i. Judgment, filed April 27, 2017;

j. Notice of Appeal, filed June 5, 2017;

k. Memorandum Decision and Order Re: Attorney Fees and Costs, filed July 27, 2017; and

l. This Amended Notice of Appeal.

7. N/A.

8. I certify:

a. N/A.

b. N/A.

c. That the estimated fee of $100.00 for preparation of the clerk's record has been paid.

d. That the appellate filing fee in the amount of $129.00 has been paid.

e. That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 1st day of August 2017.

PARSONS BEHLE & LATIMER

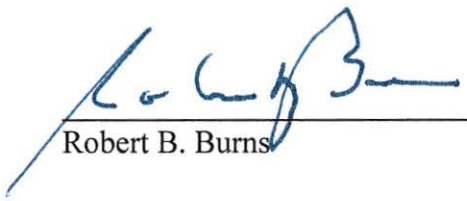
By _____
Robert B. Burns
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of August 2017, a true and correct copy of the within and foregoing instrument was served upon:

Donald F. Carey
Dina L. Sallak-Windes
Lindsey R. Romankiw
Carey Perkins LLP
980 Pier View Drive, Suite B
P.O. Box 51388
Idaho Falls, Idaho 83402-4918

- ☐ U.S. Mail
- ☒ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Delivery
- ☐ Email:



Robert B. Burns

STATE OF IDAHO } ss
County of Bonneville
I HEREBY CERTIFY that above and foregoing is a full and correct copy of the original thereof, on file in my office.
Dated 6-19-17 20___
PENNY MANNING
Clerk of the District Court
By _____
Deputy Clerk

BONNEVILLE COUNTY
IDAHO FALLS, IDAHO
2017 APR 27 PM 12:58

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC,

Plaintiffs,

vs.

BURNS CONCRETE INC., and CANYON COVE DEVELOPMENT COMPANY, LLP,

Defendants.

Supreme Court No. 45184

Case No. CV-16-3413

JUDGMENT

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2017 JUN 19 AM 9:48

JUDGMENT IS ENTERED AS FOLLOWS: all pending matters in the above entitled case are hereby dismissed, with prejudice.

DATED this 27 day April, 17.

By _____
Honorable Dane H. Watkins

FILED - ORIGINAL
JUN 19 2017
Supreme Court____Court of Appeals
Entered on ATS by: tcg.

RECEIVED
APR 25 2017
For_____

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of April, 17, I served a true and correct copy of the foregoing JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Robert B. Burns
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, Idaho 83702
Telephone (208) 562-4900
Attorneys for Defendants

[X] U.S. Mail, postage prepaid
[ ] Hand-Delivered
[ ] Overnight Mail
[ ] Facsimile (208) 562-4901

Donald F. Carey
Dina L. Sallak
CAREY PERKINS LLP
980 Pier View Drive, Suite B
P. O. Box 51388
Idaho Falls, Idaho 83402-4918
Telephone: (208) 529-0000
Attorneys for Plaintiffs

[X] U.S. Mail, postage prepaid
[ ] Hand-Delivered
[ ] Overnight Mail
[ ] Facsimile (208) 529-0005

CMC
Clerk of the Court

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

2017 JUL 27 PM 1:25

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Plaintiffs filed a Reply in Support of Motion for Costs and Attorney's Fees and Motion to Strike Defendants' Memorandum in Support of Motion to Disallow Costs and Attorneys Fees.

II. STANDARD OF ADJUDICATION

The decision whether to award attorney fees is left to the discretion of the district court. *Berkshire Investments, LLC v. Taylor,* 153 Idaho 73, 80, 278 P.3d 943, 950 (2012); *Bennett v. Patrick,* 152 Idaho 854, 856, 276 P.3d 726, 728 (2012).

III. DISCUSSION

Plaintiffs seek attorney fees and costs, totaling $ 11,933.50, under I.R.C.P. 54(d)(1)(C) and Idaho Code §§ 10-1210, 12-120(3) and 12-121.

A. Timeliness of Motion to Disallow

Plaintiffs argue that pursuant to the parties' stipulation, Defendants had up until June 6, 2017, to file objections to Plaintiffs' motion for fees and costs. Plaintiffs argue that because

Defendants' memorandum in support of their motion to disallow fees was filed after June 6, 2017, it is untimely and should be struck.

I.R.C.P. 54(d)(5) states:

> Within 14 days of service of a memorandum of costs, any party may object by filing and serving a motion to disallow part or all of the costs. *The motion . . . must be heard and determined by the court as other motions under these rules.* Failure to timely object to the items in the memorandum of costs constitutes a waiver of all objections to the costs claimed.

(Emphasis added).

I.R.C.P. 7(b)(3) provides:

> (A) A written motion, affidavit(s) supporting the motion, memoranda or briefs supporting the motion, if any, . . . must be filed with the court and served so as to be received by the parties at least 14 days prior to the day designated for hearing.
>
> . . .
>
> (D) The moving party must indicate on the face of the motion whether oral argument is desired. *If a brief or memorandum is not filed with the motion, the motion must indicate on the face of the motion whether the party intends to file a brief or memorandum supporting the motion.*

(Emphasis added).

As noted by Plaintiffs, the parties agreed by stipulation that Defendants would have until June 6, 2017, "to file objections to any memorandum of costs and attorney fees Plaintiffs may file with the Court." Defendants' motion to disallow fees and costs was filed on June 6, 2017. Defendants' motion was timely under the terms of the stipulation. Defendants' memorandum in support of the motion to disallow was filed on June 30, 2017, twenty days prior to the July 20, 2017, hearing date for the motion. Defendants filed the memorandum in compliance with the time requirements set forth in the stipulation, I.R.C.P. 7(b)(3), and I.R.C.P. 54(d)(5).

B. Prevailing Party

Defendants argue that Plaintiffs are not the prevailing party in this case under I.R.C.P. 54(d)(1)(B) and should not be awarded attorney fees. Defendants argue that Plaintiffs' complaint sought relief on three bases, under which this Court did not grant relief. They add that because the Judgment dismissed the case with prejudice, Defendants could not have received a more favorable outcome and are, therefore, the prevailing party. Defendants cite *Sanders v. Lankford,* 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000), in support of their argument.

"The determination of who is a prevailing party is committed to the sound discretion of the trial court, and we will not disturb that determination absent an abuse of discretion." *Bream v. Benscoter,* 139 Idaho 364, 368, 79 P.3d 723, 727 (2003).

In *Sanders,* Joan Sanders ran a temporary employment service. David Lankford, president and principal shareholder of Northwestern Parts Washer, Inc., signed a contract with Sanders, on behalf of Northwestern. After Northwestern failed to make payment on the contract, Sanders filed a complaint against Lankford seeking payments owed. Soon after Sanders filed the complaint, Lankford paid the amount owed and moved to dismiss Sanders's complaint. The magistrate granted Lankford's motion to dismiss on the ground that by naming Lankford instead of Northwestern, Sanders had failed to name and serve the proper party. Lankford then filed a motion for fees. The magistrate denied Lankford's motion, stating that Lankford was not the prevailing party because the lawsuit had been brought as a result of Lankford's reticence to pay his debt. The district court affirmed the magistrate court and Lankford appealed to the Court of Appeals.

On appeal, the Court of Appeals held that the magistrate's determination was inconsistent with the Rule 54(d)(1)(B) prevailing party analysis. The Court stated:

> On the prevailing party issue, governing legal standards are provided by Idaho Rule of Civil Procedure 54(d)(1)(B), which states:
>
> > In determining which party to an action is a prevailing party and entitled to costs, *the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties*, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.
>
> Thus, under I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Chadderdon,* 104 Idaho at 411, 659 P.2d at 165. The result obtained may be the product of a court judgment or of a settlement reached by the parties. *Jerry J. Joseph C.L.U. Assoc.,* 117 Idaho at 557, 789 P.2d at 1148; *Ladd v. Coats,* 105 Idaho 250, 254, 668 P.2d 126, 130 (Ct.App.1983).
>
> In our view, the magistrate did not properly apply the criteria of Rule 54(d)(1)(B) in holding that Lankford was not the prevailing party. The magistrate's determination that Sanders failed to name the proper defendant and the dismissal of Sanders' complaint are not challenged on appeal. Sanders improperly named Lankford, individually, rather than the corporation, Northwestern Parts Washer, Inc., as the defendant. The magistrate recognized the distinction between the corporate entity responsible for the debt and the party sued on the debt, Lankford, in its dismissal order. The result obtained in this case was a dismissal of Sanders' action-the most favorable outcome that could possibly be achieved by Lankford as defendant. There were not multiple claims or issues, but a single claim by Sanders for collection of an account receivable, on which Lankford was successful.
>
> Although the prevailing party determination is discretionary in nature, this discretion must be exercised within the bounds of governing legal standards. Under some circumstances application of these standards requires a holding that one party is the prevailing party on a particular claim as a matter of law. *Holmes*

> *v. Holmes,* 125 Idaho 784, 788, 874 P.2d 595, 599 (Ct.App.1994). This is such a case, for application of the Rule 54(d)(1)(B) factors can lead only to a conclusion that Lankford was the prevailing party.

Sanders v. Lankford, 134 Idaho at 325-26, 1 P.3d at 826-27 (Ct. App. 2000) (emphasis added).

The facts in *Sanders* are distinguishable from those in this case. In *Sanders,* the plaintiff did not receive any relief through the lawsuit. Although Sanders recovered from Lankford, the recovery occurred extrajudicially. In the judicial proceedings, Sanders complaint was dismissed as a result of her not naming or serving the proper party.

In this case, Plaintiffs brought an action for declaratory judgment, seeking the following relief:

> 1. Finding that the Undivided Right of First Refusal is void or voidable for failure of consideration;
>
> 2. Finding that the Undivided Right of First Refusal to Acquire Interest in Real Property is void based on equity given the unconscionable manner of its presentation;
>
> 3. Finding that if not void based on failure of consideration or based on equity, that its affect is limited to sales of the subject property, and is in no way binding on inter vivos gift transfers or intestate succession owners of the affected property;
>
> . . .
>
> 5. *For other and further relief as the Court deems appropriate* under the circumstances.

Verified Complaint at 4.

In their motion for summary judgment, Plaintiffs sought a declaration that the ROFR was personal to the parties; not binding on Mulberrys' heirs, successors, devisees, or assigns; and non-beneficial to Burns. This Court granted summary judgment to the Plaintiffs, holding that the ROFR was extinguished when Canyon Cove assigned it to Burns. This Court also held that the

ROFR was not binding on Mulberrys' heirs, successors, devisees, or assigns. Following this Court's denial of Defendants' motion for reconsideration, Plaintiffs filed a Motion to Dismiss for Mootness of Remaining Claims, which this Court granted. This Court then entered Judgment, dismissing "all pending matters in the above entitled case."

Paragraph 5 in Plaintiffs' Prayer for Relief requested: "For other and further relief as the Court deems appropriate under the circumstances." Verified Complaint at 4. This Court's declaration that the ROFR was extinguished and non-binding was in accordance with the relief sought by Plaintiffs. Although Plaintiffs' complaint was, upon Plaintiffs' motion, thereafter dismissed as moot, Defendants cannot be said to have prevailed in the matter. Plaintiffs, ultimately received the result they sought—a determination that the ROFR was not assignable. Defendants argue that they could not have obtained a more favorable outcome than the dismissal of Plaintiffs' complaint. Defendants overlook, however, that a more favorable outcome would have involved a declaration that the ROFR was assignable by Canyon Cove and binding on the Mulberrys, their successors, devisees and assigns. The fact that Defendants now appeal that determination indicates Defendants did not achieve the outcome they desired. Plaintiffs are the prevailing party in this matter.

C. Idaho Code § 10-1210

"In any proceeding under this act the court may make such award of costs as may seem equitable and just." I.C. § 10-1210. "Idaho Code § 10–1210 does not provide authority to award attorney fees in a declaratory action. In *Freiburger* we held that other statutory provisions were available in a declaratory action for an award of attorney fees." *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 141 Idaho 537, 542–43, 112 P.3d 825, 830–31 (2005) (*citing Freiburger v. J–U–B Engineers, Inc.*, Docket No. 30104, WL 674207 (March 24, 2005)).

Although Plaintiffs are entitled to recover costs under Idaho Code § 10-1210, that statute does not authorize the collection of attorney fees.

D. Idaho Code § 12-120(3)

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-120(3).

The parties agree that this case revolves around a commercial transaction. Plaintiffs, as the prevailing party, are entitled to attorney fees under Idaho Code § 12-120(3).

E. Idaho Code § 12-121

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-121.

This Court cannot conclude that Defendants defended this case frivolously, unreasonably or without foundation. Therefore, Plaintiffs are not entitled to attorney fees under Idaho Code § 12-121.

F. Amount of Fees

> If the court grants attorney fees to a party or parties in a civil action it must consider the following in determining the amount of such fees:
>
> (A) the time and labor required;

(B) the novelty and difficulty of the questions;

(C) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;

(D) the prevailing charges for like work;

(E) whether the fee is fixed or contingent;

(F) the time limitations imposed by the client or the circumstances of the case;

(G) the amount involved and the results obtained;

(H) the undesirability of the case;

(I) the nature and length of the professional relationship with the client;

(J) awards in similar cases;

(K) the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case;

(L) any other factor which the court deems appropriate in the particular case.

I.R.C.P. 54(e)(3).

The Idaho Supreme Court has explained:

"[T]he law is clearly settled that when awarding attorney fees in a civil action, the district court must consider the I.R.C.P. 54(e)(3) factors, but need not make specific written findings on the various factors." *Lee v. Nickerson,* 146 Idaho 5, 11, 189 P.3d 467, 473 (2008) (citations omitted). This rule is based upon the text of Rule 54(e)(3), which sets forth the factors that "the trial court 'shall *consider* ... in determining the amount of such fees.' (Emphasis added.)" *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988) (quoting I.R.C.P. 54(e)(3)), *overruled on other grounds by Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho 589, 130 P.3d 1127 (2006). The plain language of the Rule "does not require written findings on each factor," and the court's "failure to specifically address each separate factor does not, by itself constitute a 'clear manifest abuse of discretion.' " *Id.* Thus, in the context of the district court's determination of the amount of fees, the absence of written findings does not, *per se,* demonstrate an abuse of discretion.

Poole v. Davis, 288 P.3d 821, 824 (2012).

Considering all of the I.R.C.P. 54(e)(3) factors, this Court finds an award of $11,447.50 in attorney fees to be reasonable.

G. Costs as a Matter of Right

Plaintiffs request $266.00 in costs as a matter of right. This total is comprised of $221.00 in filing fees and $45.00 in service fees.

I.R.C.P. 54(d)(1)(C) provides:

> Costs as a Matter of Right. When costs are awarded to a party, that party is entitled to the following costs, actually paid, as a matter of right:
>
> (i) court filing fees;
>
> (ii) actual fees for service of any pleading or document in the action, whether served by a public officer or other person;

I.R.C.P. 54.

I.R.C.P. 54(d)(1)(C)(i) authorizes the $221.00 for Plaintiffs' filing fees. I.R.C.P. 54(d)(1)(C)(i) authorizes the $45.00 for Plaintiffs' service fees.

Plaintiffs should be awarded $266.00 in costs as a matter of right.

IV. CONCLUSION AND ORDER

This Court awards to Plaintiffs $11,447.50 in attorney fees and $226.00 in costs as a matter of right.

IT IS SO ORDERED.

DATED this 26 day of July 2017

DANIEL H. WATKINS, JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of July 2017, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Dina L. Sallak
CAREY PERKINS, LLP
P.O. Box 51388
Idaho Falls, ID 83402

Robert B. Burns
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702

PENNY MANNING
Clerk of the District Court
Bonneville County, Idaho

By A. Barney
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiff/Respondents, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLC, Defendant/Appellants.	)	Case No. CV-2016-3413 Docket No. 45184 **CLERK'S CERTIFICATION OF EXHIBITS**

STATE OF IDAHO)
)
County of Bonneville)

I, Penny Manning, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination:

No exhibits were admitted

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court this 25 day of October, 2017.

PENNY MANNING
Clerk of the District Court

By: _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiff/Respondents, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLC, Defendant/Appellants.	)	Case No. CV-2016-3413 Docket No. 45184 **CLERK'S CERTIFICATE**

STATE OF IDAHO)
)
County of Bonneville)

I, Penny Manning, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the District Court this 25 day of October, 2017.

7TH JUDICIAL DISTRICT COUNTY OF BONNEVILLE STATE OF IDAHO DISTRICT COURT

PENNY MANNING
Clerk of the District Court

By: Amanda L Birch
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

NORA A. MULBERRY and TN PROPERTIES LLC, Plaintiff/Respondents, v. BURNS CONCRETE, INC., and CANYON COVE DEVELOPMENT COMPANY, LLC, Defendant/Appellants.	Case No. CV-2016-3413 Docket No. 45184 **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25 day of October, 2017, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Lindsey Romankiw
980 Pier View Drive, Suite B
Idaho Falls, ID 83402-2913

Robert Burns
800 W. Main Street, Suite 1300
Boise, ID 83702

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

PENNY MANNING
Clerk of the District Court

7TH JUDICIAL DISTRICT COURT COUNTY OF BONNEVILLE STATE OF IDAHO DISTRICT COURT

By: Amanda L Birds
Deputy Clerk